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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-729

THE STOUFFER CORPORATION, d/b/a STOUFFER'S CINCINNATI INN,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 12 OF THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' INTERNATIONAL UNION, AFL-CIO,
Intervenor.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

Petitioner, The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn, a party to a representation proceeding before the National Labor Relations Board, seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which became final on August 24, 1977. That decision, dismissing petitioner's petition for review of a de-

cision of the National Labor Relations Board adverse to petitioner, was premised solely upon an asserted "longstanding rule" of this Court that certification proceedings are not subject to review in the appellate courts.

OPINIONS BELOW

The unreported Order of the Court of Appeals dismissing petitioner's petition for review is reproduced at Appendix A-80, infra.

The unreported Order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc is reproduced at Appendix A-91.

The decision of the National Labor Relations Board adverse to petitioner for which review was sought in the Court of Appeals (App. A-1) is reported at 225 NLRB No. 170.

JURISDICTION

The order of the Court of Appeals dismissing petitioner's petition for review was filed and entered on July 15, 1977 and became final on August 24 when the order of the Court of Appeals denying petitioner's petition for rehearing en banc was filed and entered.

The jurisdiction of this Court to review the Court of Appeals' dismissal of petitioner's petition for review is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Whether an employer party to representation proceedings before the National Labor Relations Board, whose status as an employer of and appropriate unit contentions with regard to

employees covered by a petition for representation under Section 9(c) of the National Labor Relations Act (29 U.S.C. Section 159(c)) are adversely determined by the National Labor Relations Board, is barred from judicial review of such agency determinations because such determinations foreclosed the "traditional" avenue of review of certification proceedings under Sections 9(d), 10(e) and 10(f) of the Act (29 U.S.C. Sections 159(d), 160(e) and 160(f))?

(2) Whether an employer party to representation proceedings before the National Labor Relations Board, whose position as a joint employer and contention that a unit limited to the employing entity with which it jointly operates is not appropriate under Section 9(b) of the Act (29 U.S.C. Section 159(b)) have been finally and adversely decided by the National Labor Relations Board, can be constitutionally denied judicial review simply because the "traditional" statutory method of review is not available?

(3) Whether an employer party to representation proceedings before the National Labor Relations Board whose status as a joint employer and unit contentions have been adversely and finally decided may challenge and obtain judicial review of such federal administrative action under and pursuant to Section 10(f) of the Act (29 U.S.C. Section 160(f)) and Section 10 of the Administrative Procedure Act (5 U.S.C. Sections 701-706) where, as here, the "usual" (and only) statutory review scheme has been made inoperative by conduct of another employer party to the same representation proceedings?

(4) Whether access to judicial review of final agency action under extraordinary circumstances not contemplated by Congress or provided for under the statutory scheme of review can be constitutionally proscribed where, as here, the conduct of another employer party to the same representation proceedings (i) denies petitioner its status as an "employer" under Section

2(2) of the National Labor Relations Act (29 U.S.C. Section 152(2)) and (ii) results in a bargaining unit determined solely upon decision of the "employer" issue, contrary to the provisions of Section 9(b) of the Act (29 U.S.C. Section 159(b))?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sections 151, et seq., are set forth at Appendix A-92.

The relevant provisions of the Administrative Procedure Act, 80 Stat. 392, 5 U.S.C. Sections 701 et seq., are set forth at Appendix A-97.

STATEMENT OF THE CASE

This case originated from a representation proceeding conducted by the National Labor Relations Board (herein "Board") upon a petition filed by Hotel, Motel, Restaurant Employees and Bartenders' Local 12 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO (herein "Local 12") under Section 9(c) of the National Labor Relations Act (29 U.S.C. Section 159(c)). Although Local 12's petition named only Cincinnati S. I. Company, a limited partnership d/b/a Stouffer's Cincinnati Inn (herein "CSI") as the "employer" of the less than hotelwide unit of "accommodations employees" sought at Stouffer's Cincinnati Inn, The Stouffer Corporation (herein "Stouffer Corporation") requested and was accorded leave to intervene and participate as a party to the representation proceeding. In that proceeding, both the Stouffer Corporation and CSI maintained and introduced evidence to show (i) that Stouffer Corporation and CSI are joint employers (within the meaning of Section 2(2) of the Act) of all employees

at Stouffer's Cincinnati Inn and (ii) that a less than hotelwide unit of employees working in "accommodations classifications" and excluding "food and beverage" classification employees is inappropriate under Section 9(b) of the Act in a highly integrated convention hotel like Stouffer's Cincinnati Inn. Upon transfer of the representation proceeding to the Board for decision and following the submission of briefs by all parties including the Stouffer Corporation, the Board issued its Decision and Direction of Election on September 8, 1976 (Appendix A-1).

The Board's September 8, 1976 order, for which Stouffer Corporation sought review in the Court of Appeals, determined (i) that Stouffer Corporation and CSI are not joint employers of the employees at Stouffer's Cincinnati Inn and, particularly, that only CSI is the "employer" of the "accommodations classification" employees sought by Local 12 (Appendix A-9) and (ii) that a less than hotelwide unit limited to the employees of CSI and excluding the "food and beverage" classification employees found to be the "employees" of Stouffer Corporation only is appropriate under Section 9(b) of the Act (Appendix A-16). The Board's determination that a less than hotelwide unit is appropriate at Stouffer's Cincinnati Inn rested solely upon the finding that Stouffer Corporation and CSI are not "joint employers" under the operating agreement and methods extant at Stouffer's Cincinnati Inn between the two business entities (Appendix A-16).

In accord with the Board's order of September 8, an election was conducted among "accommodations classification" employees at Stouffer's Cincinnati Inn on October 8, 1976 and Local 12 received a majority of the votes. On October 18, the Board certified the election results and the status of Local 12 as collective bargaining representative of "accommodations classification" employees. On November 22, 1976 and following a number of conferences in which Stouffer Corporation expressed its disagreement with the Board's findings and

urged CSI to seek judicial review of those findings by the "traditional" refusal-to-bargain statutory scheme for review of bargaining unit determinations (Sections 9(d), 10(e) or 10(f) of the Act) then available only to CSI as a result of the Board's "employer" determination, Stouffer Corporation informed Local 12 and CSI of its intention to seek judicial review of the Board's determinations adverse to Stouffer Corporation (Appendix A-18, A-20). On November 29, CSI rejected Stouffer Corporation's request to suspend bargaining pending review (Appendix A-22); no response was ever received from Local 12.

CSI, as "the employer" by operation of the Board's September 8 order, was the only employer party to the representation proceeding in a position to make use of the statutory method for judicial review of that order—e.g., "technical" refusal to bargain under Section 8(a)(5) of the Act (29 U.S.C. Section 158 (a)(5)) to obtain a bargaining order subject to judicial review in enforcement proceedings under Section 10(e) (29 U.S.C. Section 160(e)) or review proceedings under Section 10(f) (29 U.S.C. Section 160(f)) which proceedings, by operation of Section 9(d) (29 U.S.C. Section 159(d)), then make the Board's certification proceedings reviewable. With the "traditional" method of statutory review thus barred by CSI, the Stouffer Corporation—as a party to the representation proceedings before the Board—docketed its petition for review with the Court of Appeals on February 14, 1977 (Appendix A-24). That petition sought, and seeks, judicial review of the Board's final determinations adverse to the Stouffer Corporation (i) that Stouffer Corporation is not the joint employer along with CSI of all employees at Stouffer's Cincinnati Inn, including those doing "accommodations work" and (ii) that a less than hotelwide unit limited to "accommodations classification" employees and excluding "food and beverage classification" employees is appropriate at a highly integrated convention hotel.

On March 2, 1977, Local 12 filed its motion for leave to intervene in the review proceedings and was granted intervenor

status (Appendix A-27). On April 11, no response having been filed by the Board to the Stouffer Corporation's petition for review, a motion for entry of default judgment was filed (Appendix A-30); by order entered and filed April 29, 1977 (Appendix A-32), the Court of Appeals denied the motion for default and directed the Board to file the certified list within 14 calendar days. Under date of April 29, the Board filed its motion to dismiss the petition for review (Appendix A-34) contending, among other things, that only CSI and not the Stouffer Corporation was a party to the representation proceeding before the Board and therefore the Stouffer Corporation had no "standing" to seek review of determinations adverse to it (Appendix A-35). On May 17, 1977 the Board filed its certified list and all parties were directed to file briefs (Appendix A-41) with the date for the filing of the appendix and Stouffer Corporation's opening brief as petitioner eventually being set by the Court of Appeals for July 26, 1977 as a result of the grants of requests for extensions of time by the Stouffer Corporation, intervenor Local 12 and the Board (Appendix A-77).

On May 24, 1977, the Stouffer Corporation filed its opposition to the Board's motion to dismiss (Appendix A-46) demonstrating, by attachment of copies of the official report of the representation proceedings before the Board (Appendix A-56), that the Stouffer Corporation in fact was an employer party to those proceedings. On June 2 and June 3 respectively, the Board (Appendix A-61) and intervenor Local 12 (Appendix A-65) responded to the Stouffer Corporation's opposition to dismissal of its petition for review. With the exception of simplistic, and incorrect, assertions that the Stouffer Corporation was not an employer party to the representation proceeding (Appendix A-63) and that the only review method available with respect to certification proceedings under Section 9 of the Act (29 U.S.C. Section 159) is the "traditional" refusal-to-bargain method available to CSI only (Appendix A-62), the Board neither in its motion nor in its response to the Stouffer Cor-

poration's opposition addressed the extraordinary circumstances present in this case or the jurisdictional bases for review upon which the petition for review is based. Although intervenor Local 12 attempted to deal with the issues more squarely (Appendix A-68), there was no denial of the fact that the unusual circumstances of this case had neither been contemplated by Congress nor determinatively dealt with in any decided case.

By order filed and entered July 15, 1977—after the Stouffer Corporation had completed its brief on the merits for filing with the Court of Appeals on July 26 in accord with its directions (Appendix A-78)—the Court of Appeals dismissed the petition for review finding "no reason" for departure from an asserted "long-standing rule" that certification proceedings "cannot be reviewed in a Court of Appeals" (Appendix A-80). Neither that order nor the Court of Appeals' order filed and entered on August 24 (Appendix A-91) denying Stouffer Corporation's petition for rehearing en banc (Appendix A-82) addressed the issues arising out of the admitted facts that (i) certification proceedings are reviewable in the appellate courts by way of the "traditional" method of refusal-to-bargain and Sections 9(d), 10(e) or 10(f) of the Act (29 U.S.C. Sections 159 (d), 160(e), 160(f)); (ii) the "traditional" method for reviewing certification proceedings, solely as a result of the Board's finding that CSI alone was "the employer" under Section 2(2) of the Act (29 U.S.C. Section 152(2)) and the conduct of CSI in bargaining with Local 12, is not available here to the Stouffer Corporation; (iii) denial of review to the Stouffer Corporation, an employer party to the representation proceedings, would make unreviewable final agency actions adverse to the rights and interests of the Stouffer Corporation contrary to the expressions of Congressional understanding and intention evinced in Section 10 of the Administrative Procedure Act (5 U.S.C. Sections 701-706) that judicial review should be widely available to challenge the actions of federal administrative officials; (iv) the "longstanding rule" against review has never

been applied under circumstances like those here to bar review of adverse determinations made final against a party solely as a result of the nature of the adverse order (e.g., denial of "employer" status under Section 2(2) of the Act); (v) failure to accord review will render "unreviewable" all final orders of the Board in representation proceedings on the important legal issues of "single employer" or "joint employer" status under Section 2(2) of the Act (29 U.S.C. Section 152(2)) whenever, as here, the Board's order is adverse to the existence of such a legal relationship and the employing entity found to be the only "employer" (here CSI) accepts such determination as to it while the other employing entity (here the Stouffer Corporation) is "aggrieved" by the decision with respect to its "employer" status (e.g., Section 10(f) of the Act); and (vi) according "non-reviewability" to final Board orders against the existence of "single employer" or "joint employer" status under Section 2(2) of the Act (29 U.S.C. Section 152(2)), in the extraordinary circumstances here, will to the same extent make "non-reviewable" Board unit determinations based solely on the "employer" issue contrary to the mandate of Section 9(b) of the Act (29 U.S.C. Section 159(b)).

REASONS FOR GRANTING THE WRIT

Introductory

The ramifications of a definitive determination of the rights to judicial review of an employer party to representation proceedings conducted by the National Labor Relations Board under Section 9 of the Act where the "traditional" statutory review method is rendered inoperable by reason of the nature of the adverse final order of the Board are important, manifold and undecided by this Court. Similarly undecided, and of equal substantive impact not only to the formation of national labor policy but also to the application of constitutional principle where extraordinary circumstances combine to foreclose the presumed availability of judicial review of final agency action, is the extent to which Section 10 of the Administrative Procedure Act provides a basis for federal judicial review of agency action in combination with and as a supplement to a statutory scheme of review (29 U.S.C. Sections 9(d), 10(e), 10 (f)) the intended operation of which has been frustrated by an unanticipated "gap".

The absence of any dispositive resolution of the review rights of an employer party to representation proceedings barred from the statutory avenue solely as a result of a decision adverse to its status as an "employer" under Section 2(2) of the Act and the need for this Court's decisive instruction on that important issue are made evident by the decision of the Court of Appeals in this case. Thus, without consideration of the extraordinary circumstances and statutorily unanticipated foreclosure of review that occurred here, the Court of Appeals denied the only review available on the basis of an asserted "longstanding rule" derived from this Court's 1940 decision in *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401 (Appendix A-80). Although the "rule"

cited by the Court of Appeals is "longstanding" it neither dealt with the circumstances present here—where a party to the representation proceedings, with respect to whom the statutory scheme of review contemplated that judicial review would at some point be available, is barred from the review provided by the conduct of another party to the same proceeding in a way not contemplated by the statutory scheme—nor operates to foreclose the presumption of availability of judicial review, here underscored by the design of the statute itself. *American Federation of Labor*, on the contrary, turned upon the congressional policy against delay in representation proceedings where, as in that case, an entity not a party to the representation proceedings and not claiming the denial of any statutory right by direct operation of an adverse Board order sought judicial review of a Board unit determination; not being within the ambit of those for whom the statutory scheme was designed to make review available at some point, this Court simply determined that the statutory scheme manifested Congress' intent to foreclose review jurisdiction to the union seeking it. In the matter here, the opposite is the case—the statutory scheme evidences Congress' intent to make review available to an employer party but the scheme has been frustrated by an unanticipated "gap" in its operation.

Similarly undecided and requiring this Court's dispositive instruction is the extent to which Section 10 of the Administrative Procedure Act (5 U.S.C. Sections 701-706) remains available to fulfill Congress' intention and understanding that judicial review should be widely available with respect to final and adverse agency decisions where the statutory review method, by extraordinary circumstances and an unanticipated "gap", cannot fulfill its intended purpose of assuring judicial review. Although this Court's decision in *Califano v. Sanders*, — U.S. —, 51 L.Ed.2d 192 (1977) determined that the statutory scheme there considered, viewed against the 1976 congressional restructuring of the scope of federal-question jurisdiction in the

federal district courts, demanded the conclusion that the APA does not provide an "implied grant" of subject-matter jurisdiction for review in the district courts of agency action (Id. at 51 L.Ed.2d 200-201), that determination is not dispositive of and in fact particularly left open the "review" issues here. First, the "assurance of review availability" purpose and effect of the 1976 expansion of federal-question jurisdiction in the district courts are of no significance with respect to the constitutional question of the availability of judicial review in the appellate courts concerning matters ordinarily reviewable in such courts only. Secondly, this Court's decision in *Califano* did not decide the APA issue presented here—e.g., whether Section 10 (5 U.S.C. Sections 701-706) and the congressional purpose underlying it can be read, in conjunction with a statutory scheme of review, not to "imply" or "create" but to make operative a statutory system of review made inoperable because of an unanticipated "gap" in a system clearly directed to assure review rights. Third, this Court's decision in *Califano*, in distinguishing those situations like the case here where constitutional claims flowing from the denial of statutory rights (e.g., "employer" status under 29 U.S.C. Section 152(2)) are presented, reinforces the presumption of the availability of judicial review applicable to this case where no other recourse from final agency action exists (Id. at 51 L.Ed.2d 201-202). Cf., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); *Deering Milliken v. Johnston*, 295 F.2d 856, 859 (4th Cir. 1961).

Dispositive determination of the undecided "review" issues presented in this case is of particular importance when viewed against this Court's decision in *Prairie Construction Co. v. Operating Engineers*, 425 U.S. 800, 48 L.Ed.2d 382 (1976). Thus, absent review availability in circumstances like the present case where one employer party to a representation proceeding found by the Board not to be a "joint" or "single" "employer" with another business entity seeks to challenge final orders of the Board adverse to it on the "employer" and unit issues, the

Board's resolution of the breadth or scope of an employer entity or its operation will be determinative of the unit scope under Section 9(b) (29 U.S.C. Section 159(b)). Not only is such a result contra this Court's determination that decision of the "employer issue" is not dispositive of the appropriate unit question (Id. at 425 U.S. 805, 48 L.Ed.2d 386-387) but, in combination with the foreclosure of review improperly imposed by the Court of Appeals, the result becomes unreviewable.

The summary set out here demonstrates that the problem of clearly defining the review rights of an employer party to representation proceedings conducted by the Board where the statutory scheme of review is rendered inoperative solely as a result of determinations adverse to the status of that employer as a "party" is both a serious and recurring one, albeit the product of an extraordinary set of circumstances not anticipated by Congress. The absence of guidance from this Court with respect to that problem, particularly in conjunction with the presumptive availability of review of final agency action constitutionally mandated and often stressed by this Court, can only serve to promote expensive and time-consuming litigation as employer parties to representation cases, unclear as to their rights upon denial of their "employer" status in cases such as the present one, will continue to seek judicial clarification with respect to the avenue or avenues of judicial review available to them from final and adverse Board orders.

Further, apart from the merits generally of resolution by this Court of a problem which otherwise will inevitably give rise to recurring disputes as adversely affected parties seek some avenue of judicial review, certiorari is also sought because the decision of the Court of Appeals is inconsistent with the demonstrable intent of Congress in providing a statutory scheme for the review of certification proceedings and conflicts with decisions mistakenly cited by the Court of Appeals here in dis-

missing the Petition for Review (Appendix A-81).[1] In addition, the decision of the Court of Appeals erroneously disregards but, in effect, assumes as resolved the "review" issues not disposed of by this Court's decisions in *American Federation of Labor v. National Labor Relations Board*, supra, and *Boire v. Greyhound Corporation*, 376 U.S. 473, 11 L.Ed.2d 849 (1964).

A. **No "rule" of this Court denies review of final determinations adverse to an employer party to representation proceedings.**

In summarily dismissing the petition of the Stouffer Corporation for review of final agency orders adverse to its positions in a representation proceeding to which it was party, the Court of Appeals did not address the issues of the extent to which an adversely affected party can obtain review where a statutory scheme emphasizing the availability of review breaks down as a result of circumstances unforeseen by Congress. Nor did the Court of Appeals examine the correlative question of the extent to which Section 10 of the APA and the congressional objective of assuring judicial review of final agency action requires the provision of judicial review availability in circumstances where the statutory scheme and its intent to provide review are frustrated. On the contrary, the Court of Appeals simply accepted as dispositive the so-called "longstanding" rule against judicial review of certification proceedings urged upon it by the Board (Appendix A-62) and intervenor Local 12 (Appendix A-67) without analysis or examination of the meaning, application and underpinnings of that "rule" or the inapposite decisions cited in support of the rule's "longstanding".

Meaningful examination and analysis of the "rule" asserted by the Court of Appeals as a bar to the review sought here

[1] *Eastern Greyhound Lines v. Fusco*, 323 F.2d 477 (6th Cir. 1963); *Timken-Detroit Axle Co. v. NLRB*, 197 F.2d 512 (6th Cir. 1952).

illustrates that, to the extent a "rule" exists, it is not applicable and, on the contrary, its basis argues in favor of the review denied by the Court of Appeals. In particular, this Court's decisions in *American Federation of Labor v. National Labor Relations Board*, supra and more specifically in *Boire v. Greyhound Corporation*, supra, demonstrate that the "rule" against non-statutory review of Board certification proceedings is based upon certain factors whose absence in this case not only make the "rule" not applicable but require the review sought in the Court of Appeals. First, in this Court's decisions as well as in its earlier decisions cited by the Court of Appeals,[2] the entities seeking review were either not parties to the underlying representation proceedings or had available that review provided by the "traditional method" of the statutory scheme of review. Thus, in *American Federation of Labor v. National Labor Relations Board*, supra and in *Timken-Detroit Axle Co. v. NLRB*,[3] neither the union nor the employer entities respectively involved in those cases were parties to the representation proceedings or, in the "normal" operation of the statutory review procedures, would have had any judicial review available under the "traditional method" of Sections 9(d), 10(e) or 10(f) (29 U.S.C. Sections 159(d), 160(e) or 160(f)). In *Boire v. Greyhound Corporation*, supra and *Eastern Greyhound Lines v. Fusco*,[4] on the other hand, the employers seeking review in those cases were parties to the representation proceedings but sought review in the federal district courts rather than availing themselves of the statutory scheme available to them through the "traditional method." Secondly, and the only rationale common to all these cases in which non-statutory judicial review was denied, was the fact that the provision of such review would work against the

[2] *Eastern Greyhound Lines v. Fusco*, 323 F.2d 477 (6th Cir. 1963); *Timken-Detroit Axle Co. v. NLRB*, 197 F.2d 512 (6th Cir. 1952).

[3] 197 F.2d 512 (6th Cir. 1952).

[4] 323 F.2d 477 (6th Cir. 1963).

congressional policy expressed by Sections 9(d), 10(e) and 10(f) of assuring review in a manner that does not delay representation proceedings. Third, in those cases in which an employer or union entity within the intended scope of the statutory review scheme was involved (*Boire v. Greyhound Corporation*, supra; *Eastern Greyhound Lines v. Fusco*, supra) no "rule" was advanced that the adverse decisions were not subject to judicial review but, on the contrary, that no reason existed for granting an avenue of review in addition to the "traditional method" available under the statute.

Thus, to the extent parties seeking review were not parties to the underlying representation proceedings, the "rule" derived from the decisions is simply that such parties have no "standing" to seek judicial review from adverse Board orders not within the scope of rights intended to be covered by the statutory scheme of review. On the other hand, the "rule" derived from the decisions dealing with parties to the underlying representation proceedings whose rights are within the intended scope of review provided by the statutory scheme is simply that since that method of judicial review is available, no reason consistent with the congressional purpose of avoiding delay exists for departure from the statutory scheme to "create" an additional method. Application of these "rules" to the facts here, balanced against the constitutionally mandated and congressionally expressed presumption of the availability of review, conclusively shows that the Court of Appeals erroneously denied the petition for review in that (i) the Stouffer Corporation was an employer party to the underlying representation proceedings (ii) the statutory rights of the Stouffer Corporation as an "employer" under Section 2(2) of the Act and the unit contentions expressed by the Stouffer Corporation with regard to the criteria deemed necessary for determination under Section 9(b) of the Act were adversely determined to the Stouffer Corporation by the Board (iii) these adverse determinations of the Board, because of the conduct of another employer party to the representation proceedings, became final as to the Stouffer Corporation (iv) such final

and adverse Board orders and the rights of the Stouffer Corporation denied by them are within the intended scope of rights assured judicial review by the statutory scheme of the Act (v) as a result of conduct of another employer party to the same representation proceedings whose status as the only "employer" resulted from the Board's determinations adverse to the Stouffer Corporation, the assurance of review for which the statutory scheme was designed became unavailable in a manner neither contemplated by the statutory scheme nor by Congress in enacting it and (vi) no other recourse from the final agency action of the Board adverse to the Stouffer Corporation exists other than that sought in the Court of Appeals. These specific facts and circumstances, therefore, present the obverse of the facts and circumstances considered by this Court in *Boire v. Greyhound Corporation*, supra where the order for which district court review was sought determined that the employer entities party to the review proceeding constituted a "single" or "joint employer" so that either employer party had available to it the usual method of judicial review available under the statutory scheme—that method being available, this Court saw no reason to depart from it by allowing the additional review avenue of proceeding in the district court. Here, on the contrary, the Board's order for which review is sought in the Court of Appeals determined that the Stouffer Corporation and CSI did not constitute a "single" or "joint" employer thus giving to CSI only the review method available under the statutory scheme and denying the availability of that review avenue to the Stouffer Corporation. Departure from the statutory method of review, accordingly, is not sought by the Stouffer Corporation—that avenue being unavailable solely by operation of the Board's final and adverse order, the judicial review intended by Congress to be available to parties like the Stouffer Corporation is sought on the bases set out in the petition for review filed with the Court of Appeals. Under the circumstances present here, review must be afforded upon such bases consistent with congressional purpose and constitutional principle.

B. "Parties" cannot be denied review when aggrieved by final board orders denying substantive statutory rights.

The critical issues of law and policy involved in this case were not considered by the Court of Appeals. Those issues must be addressed and resolved by this Court. In that respect, analysis shows that the factor critical to reviewability of adverse agency orders—"finality"—is present under the extraordinary circumstances here.

A "final agency order" is one which denies a right, establishes or affects a legal relationship or imposes an obligation. *Cities Service Gas Company v. Federal Power Commission*, 255 F.2d 860 (10th Cir.), cert. denied, 385 U.S. 837 (1958). "Finality," and thus reviewability, must be evaluated through a "realistic appraisal" of the consequences of agency action. *Isbrandtsen Company v. U.S.*, 211 F.2d 51 (D.C. Cir.), cert. denied, 347 U.S. 990 (1954). These criteria, when meaningfully considered and applied to the facts of this case, demonstrate the requisite "finality" of the Board's adverse orders with respect to the Stouffer Corporation and illustrate that non-statutory review is the only proper judicial response to the unique, extraordinary and extreme circumstances of this case.

The essential facts to be considered are that by direct operation of the Board's adverse orders, denying "employer" status, the Stouffer Corporation has been denied all rights to effectively set standards for and directly affect the employment conditions of employees it maintains are its employees. In this respect as well as by reason of the Board's unit determination based only upon denial of its "employer rights", the Stouffer Corporation—as a "party" to the representation proceeding—is "aggrieved"[5]

[5] Section 10(f) of the Act (Appendix A-97) provides, in pertinent part, that "any person ('employer') aggrieved by a final order of the Board . . . may obtain a review of such order in any circuit court of appeals . . ."

and, because of the unavailability of the "traditional" means of review, faced with "agency finality" absent the review sought in the Court of Appeals. Further, the Stouffer Corporation's legal relationships with CSI have been prejudicially altered vis-a-vis its now diminished and perhaps non-existent ability to affect terms and conditions of employment of persons found by the Board to be employees of CSI alone. A "realistic appraisal"[6] of these facts, in the context of the unanticipated foreclosure of the "traditional" statutory scheme of review that occurred here solely by reason of the nature of the Board's order, conclusively establishes the finality of the adverse orders for which review was sought in the Court of Appeals.

The Board's adverse orders, "finally" denying the statutory rights of the Stouffer Corporation, are distinguishable from the "usual" situations erroneously relied upon by the Court of Appeals in which Board determinations have been deemed to lack "finality" because a party failed to, or chose not to, avail itself of the "traditional" method of review. The exceptional and extreme circumstances of this case, involving final orders which deny the substantive rights of a party to Board proceedings and an unforeseen foreclosure of the method of review provided by Congress, present a situation neither contemplated nor intended by Congress nor previously dealt with by the courts. Accordingly, the petition for review here must be evaluated on its own merits, in conjunction with congressional purpose and constitutional principle.

The statutory scheme of review (29 U.S.C. §§ 159(d), 10(e), 10(f)) evidences a clear-cut congressional purpose to assure judicial review to parties adversely affected by Board certification proceeding orders, once "final". Insofar as extant precedent (discussed and analyzed at Part A, supra) has denied non-statutory judicial review, such denial—in the case of "parties" to

[6] Annot., 47 L.Ed.2d 843, 851-852 (1976).

representation proceedings—has been grounded upon considerations consistent with the statutory scheme and the congressional purpose underlying it. Thus, provision of an avenue of judicial review to adversely affected parties has been withheld where the availability of statutory review through the "traditional" refusal to bargain method exists and allowance of an additional or alternative review medium would cause the kind of "delay" of Board certification orders that the statutory scheme is designed to preclude. *Boire v. Greyhound Corporation*, supra; *Bays v. Miller*, 524 F.2d 631 (9th Cir. 1975); S. Rep. No. 573, 74th Cong., 1st Sess. 14; H. Rep. No. 972, 74th Cong., 1st Sess. 20.

Neither the policy considerations against delay nor any assumption that "traditional" review will be available at some point are present here. "Traditional" review is admittedly not possible because of the effect of the Board's orders denying the Stouffer Corporation "employer" status and "delay" cannot result from the review sought in this case.[7] On the contrary, non-statutory review is not only consistent with but effectuates the clear intent of Congress to provide an accessible means of review to aggrieved parties when "finality" of agency action is conclusively established, as it is here. Further, provision of such review is constitutionally mandated where, as here, non-statutory review is the only recourse for challenge of adverse and final agency action.

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[7] *Squillacote v. Teamsters Local 344*, — F.2d —, 95 LRRM 2977 (7th Cir. 1977), among other such decisions, squarely recognizes that the "presumptive" availability of review at some point is a major premise of Section 10 of the Act (29 U.S.C. Sections 160(e), 160(f)) and that any "rule" against departure from that scheme of review is grounded only upon preventing "litigious interruptions" of Board processes (Id. at 2982-2983). Where the statutory scheme does not work to protect the review rights of parties intended to be assured review and "delaying interruption" is not a consequence, the question of availability of non-statutory review requires other considerations.

C. Review of final board orders, adverse to an employer party to representation proceedings, is consistent with the statutory scheme and constitutionally mandated.

Critical statutory and constitutional questions concerning the requirement that judicial review be available at some point under the unique and extraordinary circumstances of this case should have been, but were not, considered by the Court of Appeals. That the Stouffer Corporation, solely as a result of the Board's adverse "employer" decision, had no other judicial or administrative remedy available to it other than review by the Court of Appeals was not questioned. Nor was there any argument that the only policy reasons for precluding non-statutory review—"delay" or "circumvention" of the "usual method"—applied to the facts here. Considered in conjunction with the "final" and adverse dispositions made of the Stouffer Corporation's statutory rights and the unavailability of "traditional" review under unique circumstances neither intended nor contemplated by Congress, significant and unusual questions of that assurance of review demanded by Section 10 of the APA (5 U.S.C. Sections 701-706) in supplementation of and within the interstitial "gaps" of statutes designed to assure review as well as the due process rights to review foreclosed by unanticipated circumstances demanded and now demand consideration and resolution. *Califano v. Sanders*, — U.S. —, 51 L.Ed.2d 192, 199 (1977); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); *Retail Store Employees Union, Local 954 v. Rothman*, 298 F.2d 300 (D.C. Cir. 1962); *Deering Milliken v. Johnston*, supra at 859. Consideration and meaningful determination of these questions, where as here it is clear that judicial review has not been intentionally "withheld" by Congress under extreme and unforeseen circumstances adversely affecting and divesting a party of statutory rights to which it claims entitlement, shows that review cannot be constitutionally denied in this case. *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064 (5th Cir. 1971).

In the unique circumstances present here and in light of an express statutory recognition that judicial review should be available to "parties" (e.g., 29 U.S.C. Section 159(d), 160(e), 160(f)), review must be afforded within the purposes expressed by the statutory scheme balanced against the congressional intent expressed in Section 10 of the APA where "clear and convincing" evidence that Congress sought to assure review is shown. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, supra. The established "finality" of the Board's orders here with respect to the Stouffer Corporation's asserted rights underscores and strengthens its rights of reviewability and the importance of the statutory and constitutional principles which were not considered or applied by the Court of Appeals.

The statutory and constitutional assurances of the rights of "aggrieved" parties to seek review from "final" and adverse agency actions, under the kind of extreme and unforeseen circumstances present in this case, demonstrate that denial of review will not be tolerated where it results in the abrogation of rights conferred by Congress. This is particularly the case where, as here, no "policy" reasons for withholding review exist. E.g., *Citizens to Preserve Overton Park v. Volpe*, supra; *Abbott Laboratories v. Gardner*, supra; *U. S. v. Storer Broadcasting*, 351 U.S. 192 (1956); *Bethesda-Chevy Chase Broadcasters v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967); *Isbrandtsen Co. v. U. S.*, 211 F.2d 51, 55 (D.C. Cir.), cert. denied, 347 U.S. 990 (1954). Substantive "review" rights cannot properly be disposed of by easy reference to an asserted "longstanding rule". Those rights and the principles which support them were neither considered nor applied by the Court of Appeals. Consideration and application of those essential factors, under the circumstances present here, demonstrates that review is not only statutorily but constitutionally demanded here.

D. The decision of the Court of Appeals is in conflict with principles of review confirmed by this Court and determines the extent to which review should be available under circumstances that should be decided by this Court.

The statutory scheme of the National Labor Relations Act with respect to certification or representation proceedings (29 U.S.C. Sections 159(d), 160(e), 160(f)) is designed to assure to "parties" judicial review of final and adverse Board orders through a method that is counter-balanced against that "delay" to certification proceedings which Congress found objectionable. In providing this scheme of review, consistent with the objective of expediting certification proceedings, Congress gave effect to its intent to assure review jurisdiction to "aggrieved" persons consistent with the same expression of its intention that judicial review should be widely available expressed in Section 10 of the APA. Although the statutory scheme of review provided in the National Labor Relations Act has been rendered unworkable under the unique circumstances of this extraordinary case, that unanticipated and unforeseen flaw in the NLRA's scheme of review cannot be deemed to carry with it a corresponding defect in the jurisdictional supports to administrative review provided by the APA. The decision of the Court of Appeals, however, produces just such an illogical and improper result, contrary to this Court's continuing insistence that statutory schemes of review should not be read to foreclose judicial review of final agency action absent "clear and convincing" evidence of Congress' intent to do so. *Califano v. Sanders*, — U.S. —, 51 L.Ed.2d 192 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 1976); *Weinberger v. Salfi*, 422 U.S. 749, 45 L.Ed.2d 522 (1975); Cf., *Califano v. Goldfarb*, — U.S. —, 51 L.Ed.2d 270 at 274, footnote 3 (1977).

To the extent existence of a congressional intent is made evident by the statutory scheme for review of the National Labor

Relations Act, that intent "clearly" and "convincingly" manifests a purpose to assure judicial review to parties aggrieved by final agency action. Where, as here, that intent and purpose can be given effect consistent with avoidance of any "delay" to Board certification proceedings, due process and constitutional demands that review be available require that review be provided. Unlike the situation in *Califano v. Sanders*, supra where the party seeking non-statutory review had available to it the statutory scheme of review there dealt with and unlike the situation in *Boire v. Greyhound Corporation*, supra where the party there involved sought a method of review departing from the statutory scheme available to it, there is no question that the only avenue of review available to the Stouffer Corporation—as a party aggrieved by decisions of the Board in representation proceedings—is the avenue sought in the Court of Appeals and erroneously denied to the Stouffer Corporation. Such denial, premised solely upon an asserted "longstanding" rule of this Court derived from the inapposite decision in *American Federation of Labor v. National Labor Relations Board*, supra, disregards the decisions of this Court as well as the decisions of other courts of appeal[*] emphasizing the constitutional requirement that review not be foreclosed where not otherwise available under the statutory scheme.

Further, the denial of review by the Court of Appeals, in improperly extending the asserted "longstanding" rule of this Court's decision thirty-seven years ago in *American Federation of Labor v. National Labor Relations Board*, supra to a matter involving a party to representation proceedings barred solely as a result of the adverse decisions made from availing itself of the statutory scheme designed to provide it with review rights, attempts to determine statutory and constitutional issues of the extent to which review should be made available under circumstances specifically left unanswered by this Court in *Boire*

[*] *Squillacote v. Teamsters, Local 344*, — F.2d —, 95 LRRM 2977 at 2982-2983.

v. Greyhound Corporation, supra and *Califano v. Sanders*, supra. *Boire v. Greyhound Corporation*, supra and *Califano v. Sanders*, supra read in conjunction with one another and juxtaposed against this Court's repeated insistence upon the provision of judicial review consistent with the presumption that judicial review must be available to challenge the actions of federal administrative officials, demand the review that was sought by the Stouffer Corporation in the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

JPW
D—1593
Cincinnati, Ohio

225 NLRB No. 170

United States of America
Before the National Labor Relations Board

Cincinnati S.I. Company, a Limited Partnership d/b/a Stouffer's Cincinnati Inn Employer and Hotel, Motel, Restaurant Employees and Bartenders' Local 12 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO Petitioner	Case 9-RC-11305

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Felix C. Wade. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, this case was transferred to the National Labor Relations Board for decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the National Labor Relations Board finds:

1. The parties stipulated and we find that Cincinnati S.I. Company, a limited partnership d/b/a Stouffer's Cincinnati Inn, hereafter CSI, is a limited partnership, existing under the laws of the State of Ohio, engaged in the operations of a hotel facility in Cincinnati, Ohio. During the past 12 months, a representative period, the Employer had gross sales in excess of $500,000, and purchased goods valued in excess of $50,000, from firms located outside the State of Ohio and caused such goods to be shipped directly from locations outside the State of Ohio to its facilities in Cincinnati, Ohio. In view of the foregoing, we find that the Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning certain employees of the Employer.[1]

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[1] The Employer moved to dismiss the petition as untimely because of the allegedly expanding nature of the unit. At the time the hearing closed on March 25, 1976, there were 96 employees in various classifications. The Employer is building a 33-story structure, attached to the present facilities, which will add 438 more rooms, but no new job classifications. The anticipated date of completion is August 1, 1977. Those presently employed constitute 45 percent of the anticipated expanded 210 employee complement, and they are performing in 100 percent of the projected job classifications. In these circumstances, we are satisfied that the present employee complement constitutes a substantial and representative segment of the ultimate projected complement of employees. Accordingly, we conclude that the petition herein was not prematurely filed, and the motion to dismiss the petition is hereby denied.

4. The Petitioner seeks to represent a unit including all setup employees, doormen, bellmen, garage employees, parking attendants maids, housemen, laundry employees, linen room employees, elevator operators, seamstresses, maintenance employees, and painters, but excluding office clerical employees, bookkeepers, desk clerks, PBX operator, reservationists, night auditor, property auditor, accounts receivable clerks, health club employees, lifeguards, confidential employees, sales employees, security personnel, professional employees, and supervisors[2] as defined in the Act. The Petitioner seeks a less than hotelwide unit in that it would exclude the employees of Stouffer Corporation,[3] hereafter called Stouffer, who work in the restaurant, cocktail lounges, and banquet rooms.[4] The Employer contends that CSI and Stouffer are joint employers, and that only an overall unit including all these employees sought by Petitioner plus the employees of Stouffer is appropriate.

There are two separate entities operating at Stouffer's Cincinnati Inn. One is CSI which operates the accommodations portion of the motel, and the other is the Stouffer Corporation which

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[2] The parties stipulated, the record shows, and we find that the following persons are supervisors: Barry Cholak, general manager; Ed Nicholas, assistant manager; Earl Hatt, resident manager; Walter Moore, garage manager; Herbert Brockschmidt, set-up manager; Paul Craig, bell captain; Thelma Rupp, executive housekeeper; James Smart, director of sales; George Nagengast, district maintenance supervisor; and Ruben Grant, maintenance supervisor.

[3] The parties stipulated, the records shows, and we find that Stouffer Corporation is an Ohio Corporation engaged in the hotel and food business in several States. At its Cincinnati, Ohio, facility during the past twelve months it had gross sales in excess of $500,000 and purchased goods valued in excess of $50,000 from firms located outside the State of Ohio and caused them to be shipped directly to its facility within the State of Ohio.

[4] These employees are classified as: waiters/waitresses, cooks and pantry employees, bus help, food and beverage cashiers, hostesses, bartenders, utility employees, receiving employees, and banquet employees.

operates the restaurant, cocktail lounges, and banquet facilities. CSI owns the building in which these functions are performed and at which it operates a 462-room motel in Cincinnati, Ohio, known as Stouffer's Cincinnati Inn. CSI operates the motel under a license agreement with Stouffer Foods Corporation of Cleveland, Ohio, and the latter holds a lease agreement under which it conducts the food and beverage operations of the motel. Neither of these concerns has an interest in the other, nor do persons in one hold an office in the other.[5] The license agreement grants CSI the right to use the trade name "Stouffer's" for its motel. CSI in turn pays Stouffer a license fee equal to 5 percent of its gross room rental and agrees to adhere to "standards of quality for motel hotel operation" described in the licenses. The standards are predominantly physical standards dealing primarily with the physical appearance of the property and the manner in which it must be equipped and maintained. The license contains a list of services which CSI must provide for its guests. Insofar as is relevant herein, the license agreement provides that CSI will not compete with Stouffer, will not advertise except in an acceptable manner, and will not sell or lease the Stouffer name. The penalty for a breach of the license is revocation. There is nothing in the license agreement which pertains to wages or fringe benefits for CSI's employees. While Stouffer provides CSI information on area wage rates, Stouffer does not participate in the determination as to what the wage rate shall be nor does it overrule CSI's wage determinations. It is significant that Stouffer's quarterly inspection is aimed primarily at the physical aspects of the facilities and is only incidentally

[5] AIRCOA, a management company, is retained by CSI to assist it in managing the accommodations portions of the motel for which services CSI pays a fee. Stouffer does not retain AIRCOA in any capacity, nor do any principals of either serve as officers of the other and neither has an interest in the other. AIRCOA is owned by the partners of CSI and performs management services for other motel/hotel operations, located in various cities, which are owned by the partners.

concerned with CSI's employees. In fact, Cholak, CSI's general manager, testified this was "basically a physical inspection. As you can see, there is very little in it that dealt with personnel." Cholak further commented on the items inspected saying: "the inspector is more concerned about the physical compliance than anything else, yes. He would not get into personnel training or other items, you know, wage scales or anything else."

Of further relevance herein are two aspects of the license agreement, one of which provides that CSI "will not employ nor seek to employ any person who is at the time employed by . . . [Stouffer] and will not directly or indirectly induce any such person to leave his or her employment." This precludes transfer or interchange of employees. Secondly, the agreement specifically negates any intention by the following language: "The Company [Stouffer] and Licensee [CSI] are not and shall not be considered as joint venturers, partners or agents of each other, and neither shall have the power to bind or obligate the other except as set forth in this agreement."

Stouffer leases from CSI certain areas of the motel for the sale of food and beverages. Thus, on the first floor Stouffer has the restaurant, cocktail lounge, kitchen storage, restaurant manager's office, and three small offices for bookkeeping, personnel, and assistant managers; in the basement near the elevator Stouffer has a receiving area; and on the second floor, Stouffer has a banquet kitchen, storage areas, and cocktail lounge. The rental for these facilities is based on a percentage of the food and beverage sales made by Stouffer. While Stouffer and CSI employees may, in isolated situations, be near one another, they do not work with each other in the performance of their duties. Stouffer maintains the restaurant and cocktail lounge at its own expense. This includes plumbing, commercial refrigeration systems, kitchen exhaust systems, and other equipment situated in the areas leased by Stouffer. Stouffer pays all expenses connected with the conduct of its operations, such as taxes and in-

surance. CSI agrees not to lease or use any other space in the building for restaurant purposes and grants to Stouffer the sole right to provide food and beverages in the building.

The record shows, and we find, that Cholak, CSI's general manager, is the overall supervisor of CSI's employees and sets the wage and fringe benefits of all CSI's employees. He also handles their grievances. He is responsible only to the partners of CSI. Although as testified by Sparling, the labor relations director for Stouffer, Stouffer makes a report to Cholak concerning wages and fringe benefits, based on area surveys Stouffer has conducted, Sparling further stated it is within Cholak's sole discretion to determine its applicability.

While the license provisions set forth standards dealing with management and employee personnel, such standards are couched in general language and are at best broad guidelines which impose no significant personnel requirements on CSI. Thus, the license significantly does not reserve in Stouffer the right to determine wages, hours, or other conditions of employment, nor is there any evidence that Stouffer has the right to hire, fire, or discipline CSI employees. Insofar as Stouffer employees are concerned, Sherwood, the restaurant manager, determines their labor relations matters, including the setting of wages and handling of grievances. Both CSI and Stouffer prepare their own payroll, do their own bookkeeping, and have separate immediate and overall supervision. Each firm also has separate wage scales, and health, hospitalization, and life insurance. While Stouffer has a pension plan for its employees, CSI has none. Moreover, contact between employees of CSI and Stouffer is minimal. The greatest amount of contact are instances where CSI banquet setup employees work in preparing for Stouffer banquet functions. In this regard they set up tables, chairs, and other necessary equipment for banquet functions and remove them at the end of each function. However, these CSI employees perform their function separately and do not work

"with" Stouffer employees.[6] For this service, CSI receives from Stouffer 50 cents per meal for those dining in the banquet room. There is also some contact between the maintenance employees who are employed by CSI and the Stouffer employees inasmuch as minor maintenance is performed in the food and beverage areas by the maintenance staff. Similarly, the elevator operator not only services the housekeeping department employees but also provides elevator service for the room service waiters. The Stouffer and CSI employees have separate lunchrooms, locker rooms, and restrooms, and only CSI employees punch the timeclock on the third floor. No Stouffer personnel attend CSI department meetings. CSI and Stouffer both have their own employee pamphlets setting forth benefits, general rules and regulations, and location of services. In addition, the working hours of CSI employees differ substantially from those of the Stouffer employees.

Stouffer and CSI each pays one-half of the salaries of the employees in the sales and catering departments, and of the personnel coordinator.[7] The firms also share in the expense of these operations. Stouffer carries a share of the salaries of CSI's district maintenance supervisor and of CSI's service elevator operator. CSI and Stouffer also have joint marketing and advertising activities. They share in the use of such services as window washing, pest control, and internal security, with each paying its fair share of the cost.

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[6] The CSI banquet setup employees and bellman will also on occasion work for Stouffer as waiters and in other capacities in the banquet room and will be paid by Stouffer for such service. These appear to be the only instances of interchange of employees.

[7] The sales department employees are concerned with attracting business to the motel. The catering department is concerned with coordinating room reservations and functions for groups once they are booked into the motel. The personnel coordinator conducts the initial employment interview with nonmanagement applicants for both CSI and Stouffer and maintains certain employment records for both. However, the final determination on hiring is done by Stouffer or CSI personnel for their respective employees.

There is little contact between employees working in the food and beverage operations and the remainder of the hotel employees, particularly those in the unit sought by Petitioner. It is true that all employees involved herein are hourly paid and have some of the same benefits, but it is also true that each of these benefits is controlled by the respective Employers of the employees.

The food-beverage and the motel operations are under separate management with, as stated before, separate immediate and daily supervision. There is no evidence of interchange of employees and no overlapping of duties beyond that mentioned above. There have only been two transfers between CSI and Stouffer employees. It is our opinion that the functions of the hotel employees herein are definable and are clearly separate from those of the food-beverage employees. The operations of CSI and Stouffer are not such that either controls the labor relations policy of the other.

We have long held that the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other. It is immaterial whether this control is actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate. Here Stouffer neither exercises actual, not possesses potential, control over CSI's labor relations under the license agreement. It is undisputed that Cholak alone, with his supervisors, hires, fires, and in every other respect sets the terms and conditions of employment of the hotel's employees.

The Employer in its brief advances the contention[8] that, because of the interrelations of Stouffer and CSI and their license

[8] The joint employer issue was fully litigated herein, whereas in a prior proceeding, involving the same hotel, it was not raised. Accordingly, we base our finding herein on the evidence before us and are not bound by the prior proceeding.

and lease provisions, there is control of labor relations. But, as noted above, the agreements merely provide broad guidelines and whatever relations Stouffer and CSI have with each other they do not involve labor relations.

For the foregoing reasons, and on the record as a whole, we find Stouffer and CSI are not joint employers of all the employees employed at Cincinnati S.I. Company, a limited partnership d/b/a Stouffer's Cincinnati Inn, within the meaning of the Act.

The unit Petitioner seeks is noted above. The parties disagreed as to the unit placement of certain individuals working for CSI. Accordingly, we shall determine their status. Tom Adamson is in training to become an assistant manager, but does not possess the authority to hire or fire. His training was to end 4 months from the end of January 1976, and Cholak testified that at that time, he would have acquired the authority to hire and fire, and responsibly direct employees. As of the hearing, he had only been employed about 2½ weeks, but had attended one department head meeting. In view of the foregoing, we shall exclude Adamson, as a supervisor. As Rebecca Niemann, the front office manager is salaried, possesses the authority to hire and fire, and directs the work of about 20 persons, we shall also exclude her as a supervisor. The following individuals: Marge Nolting, sales manager; William Gryner, sales director—state organizations; Lynette Kayden, corporate sales manager; Peggy McAlpin, secretary to director of sales; and Stephanie Graule, sales receptionist, are all employed in the sales office, performing basically sales or clerical functions, work in a different location than the employees requested, have separate supervision, and do not interchange with or perform any of the duties performed by the employees sought. Accordingly, we shall exclude them as office clerical employees having no community of interest with the unit employees. Terry Rehage, assistant director of catering, is salaried and has an

office in the general office area. Her primary function is selling group food and beverage business to convention and private groups. As she does not interchange with or perform any functions of employees of the unit, we find she has no community of interest with the unit employees. The desk clerks, PBX operators, reservationists, and night auditor are office clericals, and, in conformity with Board policy to follow area practice where clear, we shall exclude these classifications. As the property auditor and accounts receivable clerk do not interchange with or perform any functions of unit employees, have no contact with unit employees, are separately supervised, and are in the general office area separated from unit employees, we find they have a separate community of interest and shall also exclude them as office clerical employees.

The parties agreed, and we find, that the executive housekeeper, Rupp, is a supervisor and is thus excluded from the unit. Under the executive housekeeper are two assistant housekeepers and three employees classified as "supervisors" by the Employer.[9] The three "supervisors" are hourly paid, earning 30 cents more an hour than the maids; they are not paid overtime; and they wear badges with their names and the word "supervisor" and uniforms colored differently from those the maids wear. Their responsibility is to see to it that the maids do the work they are supposed to do. They inspect the rooms to see that they are properly cleaned. They train new employees. When a new maid is hired, she is told she is under the wing of a "supervisor." If the maid wants to leave and has not finished her work, the "supervisor" sends her to the executive housekeeper; if the maid has finished her work, the "supervisor" has authority to allow the maid to leave for legitimate reasons. Each "supervisor" has from 11 to 14 maids working for her and when there are 3 of them they each have 6 floors

[9] There are four employees with the title "supervisor." However, one is the linen room supervisor who, in fact, supervises no one.

and 150 rooms to cover. If they are not satisfied with a maid's work they direct the maid to redo any item. The night supervisor has authority to allow maids to leave early if the executive housekeeper is not in the house. "Supervisors" also report rule infractions to the executive housekeeper. They do not have the power to hire or discharge maids. We are unable on this record to determine whether the "supervisors" are supervisors within the meaning of the Act, and, accordingly, we shall have them vote subject to challenge.

The two assistant housekeepers are in charge of the housekeeping department when the executive housekeeper is on vacation or has a day off. Rupp takes a 3-week vacation or has at least 1 day off per week. These assistants are salaried. They are not paid for overtime. They report to the executive housekeeper what the maids are doing, the nature of their work, and their attitude. They directly supervise those not "supervised" by one of the three "supervisors" discussed above. They also have the authority to call to a "supervisor's" attention anything wrong that they observe on the "supervisor's" floor. New employees are told the assistants are supervisors. When Rupp is off, the assistants can bring in maids for overtime if needed. The assistants make recommendations or evaluations as to the maids' job performance every 6 months. The assistants only make formal reports on the job performance of housekeeping employees. They do not perform any maid services. On Rupp's day off, the assistants have authority to order laundry supplies and to permit maids to go home early on personal business or for illness. They also have authority to redistribute the rooms among the maids. Cholak testified that the two assistant housekeepers were informed by Rupp that they have authority to hire and fire, and that, at the time the job was created, he and Rupp determined that the assistants would have authority to hire and fire. The two assistant housekeepers attend meetings of department heads when Rupp is absent. They have badges on their uniforms with the title

"Assistant Housekeeper." In view of the foregoing, we shall exclude the assistant housekeepers from the unit on the ground that they are supervisors.

The Employer now, in agreement with the Petitioner, would exclude the health club employees, who are separately located; have different duties, hours, and conditions of employment; are salaried and paid commissions on massages given, which represent one-third of their income; and are licensed. They have separate locker facilities in the health club and there is no interchange between health club employees and other unit employees. We find they have no community of interest with the unit employees and shall exclude them.

The three lifeguards are students who are employed from May 1 to October 1. They are contacted by the resident manager during their spring break and given an opportunity to return, but there is no certainty that they will return. The three schedule their own hours. They are hourly paid, receive a student minimum wage rate, and do not receive any fringe benefits. They do not interchange or have contact with employees in the unit found appropriate herein. As they are students hired only for the summer months, whose employment terminates with the beginning of the school year, there is no evidence these individuals have recurring jobs or are hired each season; and they have no community of interest with the unit employees. We shall exclude them from the unit found appropriate herein.

General Manager Cholak's secretary, Patricia Heidmann, is salaried, makes out the payroll from the time cards, handles Cholak's correspondence and telephone calls, assists the property bookkeeper and accounts receivable clerk, has access to personnel files, and sits in staff meetings. Accordingly, we find that she is a confidential employee and shall exclude her from the unit.

The setup men are engaged in setting up for meetings, both food and nonfood functions. They provide tables, tablecloths, ashtrays, and glasses for meetings. They subsequently breakdown the set-up, and clean the room. For a meal function, they set up all tables and chairs in a prearranged table setting arrangement. After the meal is finished, they break the tables and chairs down, remove them, and clean the room. It is their responsibility to clean and maintain the room itself as well as provide the audiovisual equipment, public address system, lectern, and easel, all of which belong to CSI. Setup men are under the supervision of CSI personnel who direct their work and supervise them in every detail. However, in certain respects they are directed by Stouffer employees. This direction is limited to setup employees following the prearranged table setting arrangement that the Stouffer personnel has communicated to the supervisor of the CSI employees. They work in the same area as Stouffer employees when the latter are participating in serving the banquet, and later when Stouffer employees remove food, china, crystal, glass, and silver. Setup employees, however, have completed their work and departed the area when Stouffer employees begin their tasks, and do not reappear until the Stouffer employees have completed their assignments and have left the area. Although they are in an area where Stouffer employees work and are engaged in certain activities where they have certain related responsibilities with Stouffer employees, as they are employees of CSI, share CSI employee benefits and conditions of employment, and are the only nonoffice clericals who would be unrepresented, we shall include them in the unit.

The bellmen and doormen have the same immediate supervision and interchange their duties. Bellmen and doormen are hourly paid, come in daily contact with unit employees, punch the same time clock, place their cards in the same rack, and perform service functions for guests, not clerical in nature, as do other unit employees. The garage employees and parking

attendants are under one supervisor. They receive free parking in the garage, punch the same time clock as unit employees, use the same rack for their time cards, and, like bellmen, perform a service function for guests and come in immediate contact with guests. The one elevator operator's hours coincide with those of other housekeeping employees. Her main function is to facilitate delivery by housekeeping of fresh linens and supplies to the guest floors. Her subordinate purpose is to aid the food and beverage delivery for room service and to bring restaurant supplies to the banquet level on occasion. Her primary purpose is to keep the elevator in service and thus prevent the food-beverage service employees from parking the elevator on the floor where they are providing room service. When she is not on duty, the elevator operates itself. She, like others in the housekeeping department, with whom she is grouped in CSI's organizational chart, is under the executive housekeeper, has the same hours as other housekeeping employees, punches the same timeclock, puts her timecard in the same rack, and is used to insure housekeeping employees easy and ready access to the elevator.

Under Executive Housekeeper Rupp are 10 laundry workers, 4 housemen, 37 maids, a seamstress, a linen room "supervisor", and the above service elevator operator. The laundry employees launder all the motel's linen on the premises. The housemen clean the public areas of the Inn; substitute to operate the washer in the laundry room; maintain the public restrooms during the day; clean the stairways, various floors, elevators, stairways, and lobby floors; move furniture; and take new linens coming in from the street and take them to the linen room. Their responsibility is largely janitorial. There are 37 maids, of whom 36 are referred to as production maids and the other as a parlor maid. The production maids perform the functions of changing the linen in the rooms, cleaning the rooms, and supplying them with necessary items for guest use. In so doing, they pick up linen and supplies, take them to the

rooms, place them in the appropriate places, and clean the rooms. The parlor maid cleans the offices of the general manager, bookkeepers, reservation and front desk clerks, and the health club. The seamstress works in the linen room on the third floor. She works the same hours as unit employees. She substitutes for maids when needed. There is no evidence that the linen room "supervisor" possesses any supervisory authority and we so find. She oversees the linen room, keeps supplies moving, and takes care of glasses for guests. She gives out linen and supplies to the maids, keeps the room tidy, takes care of lost and found items, and answers the phone. All employees under the housekeeper wear uniforms of different types for each of the separate job classifications.

The maintenance department is on the third floor next to the housekeeper's office. There are three maintenance employees and one painter. They are under the immediate supervision of Grant, the maintenance supervisor. The maintenance employees are engaged primarily in painting, refurbishing, and minor maintenance and mechanical duties in connection with the entire building. They do not work in the area where Stouffer has its facilities except to perform emergency work of a minor nature, as all Stouffer fixtures and kitchen equipment is maintained by an outside contractor. CSI's major maintenance is also contracted out.

The housekeeping, laundry, engineering, and maintenance departments are on the third floor, as are the locker rooms of the employees working in these jobs. They eat on the third floor and punch the same timeclock, and put their timecards in the same rack. They are all hourly paid and receive the same fringe benefits. We shall include these employees in the unit.

Finally, the Employer contends that the unit sought by the Petitioner is inappropriate on the ground that it is contrary to area practice, which, it asserts, supports a unit hotelwide

in scope. However, the record shows that the area practice is not clearly defined and that there are a variety of arrangements in the area. Accordingly, in view of our finding that CSI and Stouffer are not joint employers, that the employees sought by Petitioner share a community of interest, and that there is no existing and well-defined area practice to the contrary, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All setup employees, bellmen, doormen, garage employees, parking attendants, maids, housemen, laundry employees, linen room employees, elevator operators, painter, and maintenance employees at Employer's Stouffer's Cincinnati Inn, 150 West Fifth Street, Cincinnati, Ohio, but excluding office clerical employees, bookkeepers, desk clerks, PBX operator, reservationists, night auditor, property auditor, accounts receivable clerks, health club employees, safeguards, confidential employees, sales employees, security personnel, professional employees, and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 9 shall direct and supervise the election, subject to the National Labor Relations Board Rules, Series 8, as amended. Eligibe to vote are those in the unit who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before

the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[10] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Hotel, Motel, and Restaurant Employees and Bartenders Local 12 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO.

Dated, Washington, D.C. September 8, 1976.

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[10] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 9 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make this list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

STOUFFER'S

The Stouffer Corporation
1375 Euclid Avenue Cleveland, Ohio 44115
(216) 861-3450

November 22, 1976

Cincinnati S. I. Company
Cincinnati Towers
Attn: Mr. Barry Cholak
150 West 5th Street
Cincinnati, Ohio

Re: Cincinnati S. I. Company, a limited partnership,
d/b/a Stouffer's Cincinnati Inn
225 NLRB No. 170

Gentlemen:

It is our understanding that you intend to proceed to bargain with respect to the fragmented employee unit found appropriate by the Board in the above-numbered case on September 8, 1976. As the joint employer of the employees in the unit improperly found appropriate by the Board, and as such employer of all other employees working at Stouffer's Cincinnati Inn, we are in disagreement with the above-referenced unit determination, are directly affected by that determination and constitute a "person aggrieved" within the meaning and for the purposes of Section 10(f) of the National Labor Relations Act, as amended with respect to the Board's Order in this case.

It is our intention to take all appropriate steps to obtain judicial review of the above-mentioned Board Decision and, in that connection, to secure the invalidation of the Board's unit

decision. In that connection, we wish to put both of you on notice that should recognition be extended and bargaining conducted in reliance upon the Board's irregular unit determination here, such recognition and bargaining will be at the peril and jeopardy of both of you. Among other things, once it is judicially determined that the unit in question is not proper, each of you will bear joint responsibility for repayment to any employees of all initiation fees, dues and assessments which may be obtained through union security and check-off contract provisions over the several years that it will require to obtain a judicial reversal of this highly improper decision. In view of our intended course of action, and particularly the fact that both the Decision and your conduct in reliance upon it will prejudicially affect the rights and interests of this Company, we sincerely suggest and demand that no conduct be taken by either of you in reliance on this Board Decision until the matter is finally determined in a judicial forum.

Sincerely,

STEVE SPARLING
Director
Labor and Employee Relations

SS:ep

STOUFFER'S

The Stouffer Corporation
1375 Euclid Avenue Cleveland, Ohio 44115
(216) 861-3450

November 22, 1976

Hotel, Motel, Restaurant Employees and Bartenders
Local 12 of the Hotel and Restaurant Employees and
Bartenders International Union, AFL-CIO
Attn: Oscar G. Lee, President-Business Manager
1015 Vine Street, Room 710
Cincinnati, Ohio 45202

Re: Cincinnati S. I. Company, a limited partnership,
d/b/a Stouffer's Cincinnati Inn
225 NLRB No. 170

Gentlemen:

It is our understanding that you intend to proceed to bargain with respect to the fragmented employee unit found appropriate by the Board in the above-numbered case on September 8, 1976. As the joint employer of the employees in the unit improperly found appropriate by the Board, and as such employer of all other employees working at Stouffer's Cincinnati Inn, we are in disagreement with the above-referenced unit determination, are directly affected by that determination and constitute a "person aggrieved" within the meaning and for the purposes of Section 10(f) of the National Labor Relations Act, as amended with respect to the Board's Order in this case.

It is our intention to take all appropriate steps to obtain judicial review of the above-mentioned Board Decision and, in that connection, to secure the invalidation of the Board's unit decision. In that connection, we wish to put both of you on notice that should recognition be extended and bargaining conducted in reliance upon the Board's irregular unit determination here, such recognition and bargaining will be at the peril and jeopardy of both of you. Among other things, once it is judicially determined that the unit in question is not proper, each of you will bear joint responsibility for repayment to any employees of all initiation fees, dues and assessments which may be obtained through union security and check-off contract provisions over the several years that it will require to obtain a judicial reversal of this highly improper decision. In view of our intended course of action, and particularly the fact that both the Decision and your conduct in reliance upon it will prejudicially affect the rights and interests of this Company, we sincerely suggest and demand that no conduct be taken by either of you in reliance on this Board Decision until the matter is finally determined in a judicial forum.

Sincerely,

STEVE SPARLING
Director
Labor and Employee Relations

SS:ep

Arthur H. Friedman
Attorney-at-Law
816 Dixie Terminal Building
Cincinnati, Ohio 45202
Phone: 721-0712

November 29, 1976

Mr. Steve Sparling, Director
Labor and Employee Relations
The Stouffer Corporation
1375 Euclid Avenue
Cleveland, Ohio 44115

Dear Mr. Sparling:

The Cincinnati S. I. Co. acknowledges receipt of your letter of November 22nd.

As you know, following a number of Labor Board hearings, culminating in an election, the National Labor Relations Board recognized the Hotel, Motel, Restaurant Employees and Bartender's Union, Local No. 12 as the duly authorized bargaining agent for certain employees employed by the Cincinnati S. I. Co. and ordered the Cincinnati S. I. Co. to enter into collective bargaining with the said Local No. 12.

As a result of that order, the Cincinnati S. I. Co. and Local No. 12 have been engaged in collective bargaining over the past two weeks. It is the feeling of the Cincinnati S. I. Co. that it has no alternative but to continue this bargaining in good faith to ultimately arrive at a labor contract as per the order of the National Labor Relations Board. To do otherwise, unless subsequent orders superseded this order, could result in the Cincinnati S. I. Co. both being guilty of an unfair labor practice and being held in contempt of the Board's order.

It is our position that we have no alternative but to continue these negotiations unless ordered by a proper tribunal to cease bargaining.

Very truly yours,

ARTHUR H. FRIEDMAN

AHF/kw

In the United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn,
Petitioner,
v.
National Labor Relations Board,
Respondent.

No. 77-1094

PETITION FOR REVIEW

1. The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn (herein "Petitioner"), petitions the Court to set aside, suspend, modify and otherwise review the Order of the National Labor Relations Board entered on September 8, 1976 in the matter known as "Cincinnati S.I. Company, A Limited Partnership d/b/a Stouffer's Cincinnati Inn", 225 NLRB No. 170 (Case No. 9-RC-11305) before such agency. The National Labor Relations Board erroneously determined that Petitioner and Cincinnati S. I. Company, a limited partnership (herein "CSI"), were not joint employers of the employees of Stouffer's Cincinnati Inn, arbitrarily and improperly held that a grouping of employees at Stouffer's Cincinnati Inn were employed by CSI only and constituted a unit appropriate for collective bargaining under Section 9(b) of the Labor Management Relations Act (29 USC § 159(b)) in compliance with the unit sought in the petition of Hotel, Motel, Restaurant Employees and Bartenders' Local 12 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO (herein "the Union") and improperly ordered and conducted an election within such an arbitrary and improper unit to the prejudice of this Petitioner and the employees of Petitioner and CSI employed at Stouffer's Cincinnati Inn.

2. This Petition is filed and Petitioner is entitled to the relief requested herein pursuant to 29 USC § 160(f) and 5 USC § 704.

a. Petitioner is a party aggrieved and has suffered legal wrong within the meaning of 5 USC § 702 because of the aforesaid determinations of the National Labor Relations Board in 225 NLRB No. 170 (Case No. 9-RC-11305).

b. The Order of the National Labor Relations Board in 225 NLRB No. 170 (Case No. 9-RC-11305 is a final Order for which judicial review is available since CSI, erroneously determined by the National Labor Relations Board to be an employer-entity separate and apart from Petitioner with respect to some of the employees employed at Stouffer's Cincinnati Inn, has negated the only other method through which review of a National Labor Relations Board unit determination is afforded (to-wit, refusal to bargain and subsequent review of the unit determination under the provisions of 29 USC §§ 159(d), 160(e) and (f); see, *Boire v. Greyhound*, 376 U.S. 473 (1964)) by bargaining with the Union for an arbitrary and improper grouping of some of the employees employed at Stouffer's Cincinnati Inn to the prejudice of this Petitioner and all employees of Petitioner and CSI.

c. As a result of denial of the only other avenue of judicial review available as described above, the issues presented and resolved to Petitioner's detriment in 225 NLRB No. 170 (Case No. 9-RC-11305) are not otherwise reviewable, and unless review is afforded as sought here, Petitioner and the employees of Petitioner and CSI employed at Stouffer's Cincinnati Inn will suffer and continue to suffer irreparable harm and injury both in the present matter as well as in any other representation matter which may occur in the future involving the determination of appropriate unit issues at other Inns in and around the United States owned and operated by The Stouffer Corporation with other entities similar in nature and scope to CSI.

3. Contrary to the determinations of the National Labor Relations Board in 225 NLRB No. 170 (Case No. 9-RC-11305), Petitioner operates Stouffer's Cincinnati Inn as a joint employer with CSI and the National Labor Relations Board's contrary determination and consequent limitation of a unit to those employees held to be employees of CSI only to the exclusion of all other employees employed by Petitioner and CSI at Stouffer's Cincinnati Inn are improper, arbitrary and capricious and not supported by substantial evidence on the record as a whole.

Wherefore, Petitioner prays the Order of the National Labor Relations Board in 225 NLRB No. 170 (Case No. 9-RC-11305) be set aside, suspended, modified and otherwise reviewed.

Dated this 11th day of February, 1977.

In the United States Court of Appeals
for the Sixth Circuit

The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn, Petitioner, v. The National Labor Relations Board, Respondent.	No. 77-1094

MOTION FOR LEAVE TO INTERVENE

Comes now Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 12 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (herein "Intervenor"), pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and moves this Honorable court for leave to intervene in this proceeding for the review of the decision and order of the National Labor Relations Board, entered at Washington, D.C. on September 8, 1976, and in support of this motion respectfully represents:

1. Intervenor is the labor union which initiated the representation proceeding before the National Labor Relations Board (herein "Board") which resulted in the Order entered on September 8, 1976, which is the subject of this Petition for Review.

2. Pursuant to that Order an election by secret ballot was conducted among the employees of Cincinnati S.I. Company, a Limited Partnership, d/b/a Stouffer's Cincinnati Inn (herein "CSI") in accordance with the Rules and Regulations of the Board on October 8, 1976. Thereafter, on October 18, 1976, as a result of that election, Intervenor was certified pursuant to Sec. 9(a) of the National Labor Relations Act, as amended,

as the exclusive bargaining representative of all employees of CSI in the unit found appropriate by the Board.

Motion granted, noting that any time for oral argument is subject to agreement of the parties as to sharing allocated time.

/s/ J. P. Hehman
Clerk

On December 28, 1976, Intervenor and CSI entered into a collective bargaining agreement effective December 5, 1976 through December 4, 1979, covering the wages, hours of employment and other conditions of employment of said employees.

3. Intervenor, if permitted to appear before this court as herein requested, desires to present a brief and submit oral argument in support of said Order of the Board entered as aforesaid. Intervenor respectfully submits that it has an important and considerable interest in the outcome of this proceeding in that any order of this court setting aside, suspending or otherwise modifying the Order of the Board sought to be reviewed would necessarily result in great harm and damage to Intervenor and the employees of CSI whom it represents and who are covered by the collective bargaining agreement between Intervenor and CSI referred to above. Specifically, the setting aside, suspension or modification of said Order may invalidate the Certification of Representative issued by the Board, may invalidate the said collective bargaining agreement, would deprive said employees represented by Intervenor of their rights under and pursuant to said agreement, may require repayment of the membership dues paid to Intervenor by said employees pursuant to the union security and check-off provisions of said agreement, and would otherwise hinder and disrupt the bargaining relationship now existing between Intervenor and CSI.

Wherefore, Intervenor respectfully moves this honorable court: (1) that it be permitted to intervene as a party in this review of the decision and order of the National Labor Relations Board dated September 8, 1976, and that it further be allowed the privilege of filing briefs and arguing orally before this court; and (2) for such other and further relief as to the court may seem just and proper and as the exigencies of the case may appear.

Dated this 2nd day of March, 1977.

In the United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation d/b/a
Stouffer's Cincinnati Inn,
Petitioner,
v.
National Labor Relations Board,
Respondent.
No. 77-1094

MOTION OF PETITIONER FOR ENTRY OF DEFAULT JUDGMENT

Comes now Petitioner, the Stouffer Corporation d/b/a Stouffer's Cincinnati Inn, by and through its attorney, and respectfully moves the Court to enter a Judgment of Default against Respondent National Labor Relations Board for the relief requested in said Petitioner's Petition for Review, setting aside, suspending or modifying the Order of the National Labor Relations Board in 225 NLRB No. 170 (Case No. 9-RC-11305).

As grounds for this Motion, Petitioner states:

1. That the instant Petition for Review was docketed in this Court and a certified copy thereof was served on Respondent National Labor Relations Board by letter of the Clerk on February 14, 1977.

2. Hotel, Motel, Restaurant Employees and Bartenders' Union Local No. 12 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO, filed a Motion for Leave to Intervene on March 2, 1977 which Motion was subsequently granted by this Court.

3. Pursuant to the provisions of Rules 17 and 26(c) of the Federal Rules of Appellate Procedure, Respondent National Labor Relations Board was to have transmitted the record of the proceeding before it, 225 NLRB No. 17 (Case No. 9-RC-11305), to the Clerk within 40 days after service of the instant Petition for Review upon it, or before March 30, 1977.

4. No extension of time has been granted Respondent National Labor Relations Board by this Court within which to file the record as required by Rule 17 of the Federal Rules of Appellate Procedure.

5. Respondent National Labor Relations Board has not, as of the date of the filing of this Motion, complied with the provisions of Rule 17 of the Federal Rules of Appellate Procedure or the dictates of this Court regarding strict compliance with the time schedules specified in the Federal Rules of Appellate Procedure, and has failed to transmit said record to the Clerk.

6. Respondent National Labor Relations Board is disrupting and impeding the orderly process of the instant Petition for Review and this Court's docket by its failure to transmit the record to the Clerk within the time required by Rule 17 of the Federal Rules of Appellate Procedure.

Wherefore, for the foregoing reasons, Petitioner The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn prays that the Court enter a Judgment of Default against Respondent National Labor Relations Board as hereinabove requested.

Dated this 9th day of April, 1977.

No. 77-1094

United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn,
Petitioner,
v.
National Labor Relations Board,
Respondent,
Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 12 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO,
Intervenor.

ORDER

Upon consideration of the petitioner's motion for entry of default judgment, the intervenor's memorandum in opposition thereto and the respondent's motion in opposition thereto,

It is ORDERED that the motion for default judgment be and it hereby is denied.

Upon further consideration of the respondent's motion for leave to file instanter a motion for extension of time for filing the certified list, it is ORDERED that the motion be and it hereby is granted.

Upon further consideration of the respondent's motion for extension of time to file the certified list, it is ORDERED that

the motion be and it hereby is denied. Respondent is granted leave to file the certified list not later than fourteen (14) calendar days from the file date of this order.

Entered by Order of the Court

JOHN P. HEHMAN, Clerk

In the United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn,
Petitioner,
v.
National Labor Relations Board,
Respondent.
No. 77-1094.

MOTION TO DISMISS PETITION FOR REVIEW

To the Honorable, the Judges of the United States Court of Appeals for the Sixth Circuit:

The National Labor Relations Board, Respondent herein, hereby moves the Court to dismiss the petition for review herein on the grounds that the Board's Decision and Direction of Election is not a final order subject to judicial review under Section 10(f) of the National Labor Relations Act. (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151, *et seq.*) In support of its Motion, the Board submits herewith its Memorandum of Points and Authorities.

WHEREFORE, the Board respectfully prays that its motion to dismiss be granted.

Respectfully submitted,

ELLIOTT MOORE
Deputy Associate General Counsel
National Labor Relations Board

By WILLIAM WACHTER
Assistant General Counsel for
Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570

Dated: Washington, D.C. April 29, 1977.

Memorandum of Points and Authorities in Support of Motion to Dismiss Petition for Review

The petitioner, Stouffer Food Corp., (herein "Stouffer") has a license agreement with the Cincinnati S.I. Company (herein "CSI"), a limited partnership, which grants to CSI the rights to use the trade name "Stouffer's" for its motel located in Cincinnati, Ohio. Pursuant to this license agreement, CSI operates a motel known as Stouffeur's Cincinnati Inn (herein "the Inn"). Stouffer holds a lease agreement with CSI under which Stouffer conducts the food and beverage operations at the Inn. These operations include a restaurant, cocktail lounges and banquet rooms.

The Hotel, Motel Restaurant Employees and Bartenders' Local 12 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO (herein "the Union") filed a petition for an election among employees of CSI who work at the Inn. The unit sought by the Union was a less than "hotel-wide" unit in that it did not include the employees of Stouffer who work in the Inn's restaurant, cocktail lounges and banquet rooms. *CSI contested* the unit sought by the Union contending *inter alia* that CSI and Stouffer are joint employers of all employees working at the Inn, and that only an overall unit including the employees sought by the Union plus the employees of Stouffer is appropriate.

On September 8, 1976, following a hearing, the Board issued its Decision and Direction of Election, 225 NLRB No. 170 (Attachment "A") in which it found, contrary to CSI's contention, that CSI and Stouffer do not constitute a joint employer. The Board also found that the unit sought by the Union was an appropriate one and accordingly, directed that an election be conducted among the employees therein. Thereafter, Stouffer, claiming to be a party aggrieved by a final Board order, filed a petition with this Court to review the Board's ruling.

Argument

Courts of Appeals, unlike district courts, are "without the jurisdiction over original suits conferred on district courts by § 24 of the Judicial Code, as amended 28 U.S.C. § 41. Such jurisdiction as [they do have], to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review." *A.F.L. v. N.L.R.B.*, 308 U.S. 401, 403 (1940). Here, the provision of the National Labor Relations Act which gives a right to review is Section 10(f) (29 U.S.C. § 160(f)). The language and legislative history of this Section make clear that, in the instant case, the Court does not have jurisdiction to entertain Stouffer's petition for review.

Section 10(f) provides that "any person aggrieved by a final order of the Board" may petition for review in an appropriate Court of Appeals. "[I]t has long been established that the phrase 'a final order of the Board,' as used in this Section (10(f)), refers to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for unfair labor practices found—in either case an order entered at the culmination of the procedure described in Section 10(b) and (c) of the Act."[1] *Laundry Workers Union v. N.L.R.B.*, 197 F. 2d 701, 703 (C.A. 5, 1952). See *A.F.L. v. N.L.R.B.*, 308 U.S. 401 (1940); *Boire v. Greyhound Corp.*, 376 U.S. 423, 476-477 (1964); *Eastern Greyhound Lines v. Fusco*, 323 F. 2d 477, 479 (C.A. 6, 1963); *Local 542 Operating Engineers v. N.L.R.B.*, 328 F. 2d 850, 853-854 (C.A. 3, 1964), *cert. denied*, 379 U.S. 826.

Similarly, it has long been settled that Board rulings in representation proceedings under Section 9 of the Act—e.g., setting

[1] Section 10(b) and (c) authorizes the Board, after the filing of a charge alleging Section 8 unfair labor practices, to issue complaints, hold hearings, find facts, determine issues, and enter orders dismissing complaints or directing remedies for unfair labor practices found.

aside, directing, or refusing to direct an election, designating a proper unit, or certifying a union as bargaining representative—are non-adversary in nature and do not result in judicially reviewable final orders. *Boire v. Greyhound Corp., supra; A.F.L. v. N.L.R.B., supra; Modern Plastics v. McCulloch*, 400 F. 2d 14, 19 (C.A. 6, 1968); *Cameron v. N.L.R.B.*, 33 LRRM 2133 (C.A. 6, 1953); *Timken Detroit Axle Co. v. N.L.R.B.*, 197 F. 2d 512, 513 (C.A. 6, 1952); *Eastern Greyhound Lines v. Fusco, supra*, 323 F. 2d at 479. This is so because, as the Supreme Court early recognized, the former order "authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. On the other hand, the latter determination "authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice," *A.F.L. v. N.L.R.B., supra*, 308 U.S. at 404. See Section 9(d)[2] and cases cited *supra*, p. 3.

That Congress, by structuring the Act in this manner, intended to preclude direct review of representation determinations is clear. At the time Congress enacted the Wagner Act it considered and rejected the suggestion that all orders of the Board should be reviewable in the Courts of Appeals. Instead, Congress chose to exclude representation certifications of the Board from federal appellate review, except in the circumstances specified in Section 9(d). See, discussion in *A.F.L. v. N.L.R.B., supra*, 308 U.S. at 409-410.

Moreover, legislative history of 1947 Amnedments to the Act clearly reveals that Congress was aware that under this statutory

[2] Section 9(d) of the Act provides for the certification by the Board of the record of a representation proceeding in the case where there is a petition for review of an order of the Board made pursuant to Section 10(c) and based in whole or in part upon the facts certified in the representation proceeding. In that event, the record in the certification proceeding becomes part of the record upon which the decree of the Court reviewing the unfair labor practice order is based.

scheme certain instances might arise, such as the instant case, where Board representation decisions might not be subject to Court review. See *A.F.L. v. N.L.R.B., supra,* 308 U.S. at 411; *Boire v. Greyhound, supra; Leedom v. Kyne, supra.* Nevertheless, Congress determined that continued restricted judicial review was necessary in view of the overriding need to expeditiously resolve issues in countless representation cases. Thus, the House Bill, H.R. 3020, contained provisions permitting any interested person to obtain court review of a Board certification in the same manner as a final Board order. The House Report accompanying the bill (H.R. Rep. No. 245, 80th Cong., 1st Sess. at 43) explained that the changes were necessary because employees and unions that had lost elections had no recourse to judicial review "no matter how wrong the [Board's] certification may be." The Senate bill (S. 1126), however, did not contain a corresponding section and the House provision was subsequently deleted by the conference committee because such a provision would permit dilatory tactics in representation proceedings. See Remarks of Senator Taft, 93 Cong. Rec. 6444.

The Board decision here—directing a representation election—falls squarely within the category of rulings under Section 9 for which direct review in the Court of Appeals has been consistently denied.[3] See *A.F.L. v. N.L.R.B., supra; Cameron v. N.LRB, supra; Local 542, Operating Engineer v. N.L.R.B., supra,* 328 F. 2d at 853-854; *Bays v. Miller,* 524 F. 2d 631

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[3] This general rule of nonreviewability applies to Board representation case decisions in all but a few rare circumstances, the principal exception being a case in which the Board's order, by its own admission, contravenes a specific prohibition of the Act. *Leedom v. Kyne,* 358 U.S. 84 (1958). See, *McCulloch v. Sociedad National,* 372 U.S. 10 (1962). However, even the rare exceptions do not permit direct review in the Courts of Appeals, which Stouffer's seeks here, but provides only for limited review in a district court. *Boire v. Greyhound, supra,* 376 U.S. at 479-480; *Eastern Greyhound Lines v. Fusco, supra,* 323 F. 2d at 479; *Cameron v. N.L.R.B.,* 33 LRRM 2133 (C.A. 6, 1953), *Local 542, Operating Engineer v. N.L.R.B., supra,* 328 F. 2d at 853-854.

(C.A. 9, 1975). Nor does this general rule of nonreviewability fall here, merely because the party seeking relief has no readily available avenue to court review. It is true that the Board's resolution of the joint-employer issue precludes Stouffer from refusing to bargain and thereby precipitating an unfair labor practice proceeding. (See, pet. for review, p. 2.) However, as shown *supra,* pp. 4-5 (A. 37, 38), a full review of the legislative history of the Act reveals a strong and lasting Congressional intent to avoid delay in representation proceedings. And the Courts have consistently held that this policy overrides any presumption of the availability of judicial review, except in the rare situation (not alleged here) where the Board has acted in direct contravention of a specific mandate of the Act. See, *supra,* pp. 4, 5 (A. 37, 38), n. 3. Thus, the Ninth Circuit observed in *Bays v. Miller, supra*:

> To permit [a party seeking review] to go behind this formal correctness and challenge the merits of the Board's finding, even by application of a narrow "abuse of discretion" standard, would require the Court to make a time-consuming analysis of the Board's factual findings and legal conclusions. The availability of such challenges would allow the dilatory maneuvers which Congress chose to prevent.

In the instant case, Stouffer does no more than to challenge the Board's determinations that it is not a joint employer with CSI of the latter's employees at the Stouffer Cincinnati Inn, and that a unit comprised of CSI's, but not Stouffer's, employees at the Inn is appropriate. These are precisely the sort of determinations which the Supreme Court has held are not subject to judicial review except if, and when, they form the basis for a final unfair labor practice order. *A.F.L. v. Labor Board, supra; Boire v. Greyhound, supra.* It is therefore apparent that Stouffer's position for review must be dismissed.

Conclusion

For all the foregoing reasons, the Board respectfully submits that the petition for review must be dismissed for lack of jurisdiction.

Respectfully submitted,

JOHN S. IRVING
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Dated: Washington, D.C., April 29, 1977

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit
Cincinnati, Ohio 45202

John P. Hehman
Clerk

May 17, 1977

Mr. Gerald Tockman
Mr. Louis N. Laderman
706 Chestnut Street, Suite 1010
St. Louis, Missouri 63101

Re: The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn, Petitioner v. National Labor Relations Board, et al., Respondent
Our No. 77-1094
NLRB No. 9-RC-11305

Dear Counsel:

In accordance with Section 10(e) of the National Labor Relations Act, as amended, you are hereby notified of the filing today of the certified list of all documents, transcripts of testimony, exhibits and other material upon which the order of the Board was entered in the above case. The Board has filed this certified list in lieu of transmitting the entire record to this Court. See, Rule 17, Federal Rules of Appellate Procedure.

A copy of the certified list is enclosed.

Your attention is directed to Rule 25(d), Federal Rules of Appellate Procedure which requires that all papers presented for filing must include a certification that service on opposing coun-

sel has been effected. The certificate should indicate the *date*, the *manner* of service and the *names* of those served.

Please acknowledge receipt of this letter.

Very truly yours,

John P. Hehman, Clerk
/s/ By Suzanne W. Hogan
Suzanne W. Hogan
Deputy Clerk

cc: w/o encl.

Mr. Elliott Moore
Deputy Assoc. General Counsel
N.L.R.B.
1717 Pennsylvania Ave.
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United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation d/b/a Stouffer's Cincinnati, Inn, Petitioner, v. National Labor Relations Board, Respondent.	No. 77-1094

Certified List of the National Labor Relations Board

The National Labor Relations Board, by its Executive Secretary duly authorized by Section 102.115, Rules and Regulations of the National Labor Relations Board—Series 8, hereby certi-

fies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 9-RC-11305. Such transcript includes the pleadings and testimony and evidence upon which the Order of the Board was entered and includes also the findings and order of the Board.

Volume I—Exhibits introduced into evidence at the Hearing:

Board's Exhibit Nos.:

1-A thru 1-F
2 thru 9
10 and 10(a)
11 and 11(a)
12 and 12(a)
13 thru 18

Employer's Exhibit Nos.:

1 (rejected)
2 thru 8
9 (rejected)
10 thru 40

Petitioner's Exhibit Nos.:

1 thru 3
4 and 4-A
5 (identified only)
6 thru 38

Volume II — *Certified Record*

Stenographic transcript of testimony taken before Hearing Officer Felix C. Wade on January 6, 7, 19, 22, 24, 26, 27, 28, 29 and 30, 1976 1-731

Volume III

Stenographic transcript of testimony taken before Hearing Officer Felix C. Wade on February 9, 10, and March 15, 16, 17, 18, 24, and 25, 1976 . . . 732-1444

Volume IV—Pleadings

1. Copy of Union's Brief to the Board, dated May 26, 1976 1-51
2. Copy of Petitioner's Brief, dated June 1, 1976 1-50
3. Copy of Decision and Direction of Election issued by the National Labor Relations Board on September 8, 1976 1-19

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 12th day of May, 1977.

John C. Truesdale
Executive Secretary
National Labor Relations Board

(Seal)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Stouffer Corporation
d/b/a Stouffer's Cincinnati, Inn

Case No.: 9-RC-11305

11.19.75 Petition filed.

11.28.75 Notice of Representation Hearing, dated.

12.11.75 Order Rescheduling Hearing, dated.

1. 6.76 Hearing opened.

1. 6.76 Petitioner's Interim Motion to the Regional Director, dated.

1. 6.76 Petitioner's Motion for Order to Show Cause why the Petition should not be dismissed Administratively, dated.

1. 6.76 Petitioner's Motion to the Regional Director requesting a copy of his denial, dated.

1.15.76 Regional Director's Order denying Petitioner's Interim Motion, dated.

1.20.76 Regional Director's Order denying Petitioner's Motion for Order to Show Cause, dated.

1.20.76 Petitioner's request for extension of hearing date, dated.

1.20.76 Telegram rescheduling hearing, dated.

2.27.76 Order Rescheduling hearing, dated.

3. 2.76 Union's letter requesting rescheduling of the hearing, dated.

3. 8.76 Telegram rescheduling hearing, dated.

3.25.76 Hearing closed.

3.25.76 Order transferring Representation case to the National Labor Relations Board, dated.

5.26.76 Union's Brief to the Board, dated.

6. 1.76 Petitioner's Brief, dated.

9. 8.76 Board's Decision and Direction of Election, dated.

In the United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation d/b/a
Stouffer's Cincinnati Inn,
Petitioner,
v.
National Labor Relations Board,
Respondent.
No. 77-1094

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

To the Honorable, the Judges of the United States
Court of Appeals for the Sixth Circuit:

The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn, Petitioner herein, moves the Court to deny the Motion to Dismiss filed by the National Labor Relations Board, Respondent herein, for the reasons that said Motion is both untimely and without merit under the extraordinary and exceptional circumstances presented by the Petition for Review herein. In support of this Opposition, Petitioner submits herewith its Memorandum of Points and Authorities.

Wherefore, Petitioner respectfully moves the Court to deny Respondent's motion to dismiss and to consider the instant petition for review on its merits.

Respectfully submitted,

GERALD TOCKMAN

Dated this 24th day of May, 1977.

Memorandum of Points and Authorities in Support of Opposition to Motion to Dismiss

I. **Preface.**

Petitioner, The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn (herein "The Stouffer Corporation") filed its petition for review of the Order of Respondent National Labor Relations Board (herein the "Board") in the matter known as "Cincinnati S. I. Company, A Limited Partnership d/b/a Stouffer's Cincinnati Inn and Hotel, Motel, Restaurant Employees and Bartenders' Local 12 of the Hotel and Restaurant Employees and Bartenders' International Union, AFL-CIO", 225 NLRB No. 170 (Case No. 9-RC-11305) [Attachment "A" to the Board's Memorandum of Points and Authorities, herein referred to as "Board Memorandum"] on *February 14, 1977*. On March 2, Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 12 (herein "Local 12") was granted leave to intervene pursuant to Local 12's motion therefor "to present a brief and submit oral argument" in support of the Board's Order in 225 NLRB No. 170 (Motion for Leave to Intervene, paragraph 3). On *May 2, 1977*, following notifications from the Court and Intervenor Local 12[1] with respect to the filing of the record herein, the Board instead filed its Motion to Dismiss in disregard of the fifteen (15) day time limitation for such motions and without leave of Court for filing out of time.[2] That Motion, as hereinafter demonstrated, is as inaccurate as it is untimely.

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[1] In its *April 19, 1977* Opposition to Petitioner's Motion for Entry of Default Judgment, Intervenor Local 12 stated that Intervenor had contacted the Board on a number of occasions concerning the need to respond herein and that Intervenor was informed nothing had been done "due to an oversight on the part of the attorney assigned to the matter". Such "oversight" is further reflected in the Board's failure to file the certified list, pursuant to Fed.R.App.P. 17(b), within the time set by this Court's Order of April 29, 1977.

[2] 6th Cir. R. 8; Fed.R.App.P. 27(d), 32(b).

II. **Statement of the Case.**

The Board's statement of the case that Cincinnati S. I. Company ("CSI") "contested the unit sought" by Local 12 "contending that CSI and Stouffer are joint employers" and that the Board's Order for which review is sought here "found contrary to CSI's contention" (Board Memorandum, pps. 1-2) is directly the opposite of what is involved here. The Board's Order (Attachment "A" to Board Memorandum) and the record of the proceedings in the underlying representation matter No. 9-RC-11305 on which it was based (Certified List of the National Labor Relations Board, filed May 17, 1977) show: *The Stouffer Corporation and CSI, not CSI only, were parties* to and participated in the representation proceedings;[3] *The Stouffer Corporation and CSI, not CSI only, contested* the unit sought by Local 12; *The Stouffer Corporation and CSI, not CSI only, contended* that The Stouffer Corporation and CSI were the joint employer of the employees in the unit sought;[4] and, the Board's *Order found contrary to the contention of The Stouffer Corporation and CSI, not CSI only*.[5] CSI determined to accept the Board's Order, thus foreclosing the "traditional

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[3] In the hearings conducted in Case No. 9-RC-11305 (Volume II, Certified List at pages 23, line 16-24, line 14; and 30, line 23-32, line 1 of the Certified Record), in order that "*all parties* would be before the Board", Hearing Officer Felix C. Wade granted the motion of the Stouffer Corporation to intervene (copies of the relevant record pages are appended, for the Court's convenience, as "Exhibit 1").

[4] The Brief filed with the Board was filed on behalf of *The Stouffer Corporation and CSI*, summarizing the contentions of *both parties* to the representation proceedings (Certified List, Volume IV, item 2).

[5] The Board's Order (Attachment "A" to Board Memorandum), in addition to specific determinations concerning the corporate and interstate commerce aspects of The Stouffer Corporation (Attachment "A", p. 3 at fn. 3), expends nine (9) pages discussing and making "conclusions" concerning the contentions and evidence elicited by The Stouffer Corporation and CSI (Attachment "A", pps. 1-9) with respect to the joint employer issue.

method" for review[6] of the Board's adverse determinations *with respect to The Stouffer Corporation and its contentions*—The Stouffer Corporation, being aggrieved by that Order and the final consequences *to The Stouffer Corporation* flowing from it, filed the petition for review now before this Court. That petition, as hereinafter maintained, is a proper basis for that judicial review of final administrative agency determinations constitutionally mandated by fundamental due process.

III. **Argument.**

Although academically informative, the Board Memorandum does not address the issues before this Court. Neither the decisions cited by the Board nor the discussion of the "traditional method" for review (Board Memorandum, pps. 2-6) deal with the critical questions here. Those questions, simply put, are:

1. Whether a party to a representation proceeding (The Stouffer Corporation), whose position and contentions (e.g., "employer status" and "unit propriety") are finally denied by Board Order, can obtain judicial review of such "agency action"?

2. Whether the "traditional method" for such judicial review, even if unavailable under the extraordinary circumstances here, is the only method for that judicial

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[6] CSI, as noted by Local 12 in its Motion For Leave To Intervene, participated in an election conducted in the employee unit found "proper" by the Board's Order for which review is sought here and, following certification, entered into a collective bargaining agreement with Local 12 (Motion For Leave To Intervene, paragraph 3). This conduct, as the Board itself acknowledges (Board Memorandum, pps. 5-6), denied to The Stouffer Corporation what the Board contends is the "usual" and "only" avenue for review of Board representation proceeding determinations, e.g., review when the representation determinations are the "basis" for a refusal to bargain order (Board Memorandum, pps. 2-6).

review of final agency action which due process requires?

These issues, and the position of The Stouffer Corporation, with respect to them, are set out *infra*.

1. **"Finality" of agency action demands availability of judicial review.**

Acceptance by CSI of the Board's determinations that CSI and The Stouffer Corporation do not constitute a "joint employer" and that a unit limited to some of the employees working at Stouffer's Cincinnati Inn is proper,[7] without question, finally resolved such matters with respect to CSI and Local 12. *Such "finality"*, however, *is equally applicable to and determinative of the contrary position and contentions of The Stouffer Corporation under the extraordinary circumstances present here.* In fact, the Board acknowledges such finality as to The Stouffer Corporation but simply maintains that such conclusive, adverse determinations[8] are not subject to review (Board Memorandum, pps. 5-6).

All of the authorities cited by the Board in its Argument (Board Memorandum, pps. 2-6) deal with situations where only *one party* was involved in a Board representation proceeding and *that party* sought to circumvent the readily available method of "traditional review." Here, notwithstanding the Board's fail-

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[7] See note 6 supra and text thereby supported.

[8] That adverse determinations of the kind for which review is sought here are "final" cannot be gainsaid. For example, Black's Law Dictionary (4th Ed. 1968) defines "final order" at page 1247 as:

> "One which terminates the action itself, or *decides some matter litigated by the parties,* or *operates to divest some right;* or one which completely *disposes of* the subject-matter and *the rights of the parties.*" (emphasis added)

ure to acknowledge the "party-status" of The Stouffer Corporation in the underlying representation proceedings, there are *two parties* to the final determinations contained in the Board's Order—although one party (CSI) has closed off the "traditional" avenue of review, such closure does not make the Board's determination as to the other party (The Stouffer Corporation) any less "final" or "reviewable". On the contrary, absent the "circumvention" and "delay" considerations underlying the policies with respect to the "traditional review" authorities cited by the Board,[9] the extraordinary circumstances here[10] illustrate why "finality" and thus "reviewability" exist.

The Board's Argument does not and cannot seriously quarrel with the facts that its Order is "final" and "aggrieves" The Stouffer Corporation with respect to those determinations for which The Stouffer Corporation, as a party to the underlying representation proceeding, seeks review in this Court. On the contrary, the Board simply ignores the questions of finality and adverse disposition by the expedient of the "traditional review" argument it "traditionally" makes—e.g., the "usual method" is the only avenue of review. But, Congress did not intend the "traditional review" procedure to serve as a "weapon" for denying

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[9] Board Memorandum, pps. 3-5.

[10] Although the Board makes light of the substantive adverse determinations to the rights and interests of The Stouffer Corporation for which review is sought here (e.g., Board Memorandum, p. 6 at the last paragraph of Argument), it neither denies "finality" or that The Stouffer Corporation is "aggrieved". More importantly, the Board does not and cannot cite any case like the one before this Court wherein review has been denied in a two-party, joint employer situation. *Boire v. Greyhound Corporation,* the only "joint employer" decision cited, instructs exactly the opposite of the Board's conclusion. In *Boire* where the "joint employer" determination was opposite that here, e.g., the two parties were determined to be a "joint employer", the only basis for denying review was the availability to *either party* of the "traditional review" method. Absent such availability, which under the circumstances present here is clearly not available, the Court made clear that review would not only have been proper but required.

judicial review to an aggrieved party whose rights have been affected or denied by what that party contends is an arbitrary and improper administrative decision. The unavailability of "traditional review", under the extraordinary circumstances here, demonstrates the "finality" and "reviewability" of the Board's Order as applied to The Stouffer Corporation.

> ". . . [T]he courts must remain mindful of their position as the only source of relief available to most claimants.
>
> . . .
>
> The courts enjoy a different perspective from the legislature, however, for they also must sit as a check on governmental excesses and into the calculus of interest they add a general presumption of reviewability. Indeed, it would be rare that a court was without jurisdiction to entertain any objections whatever. Even under the committed-to-agency discretion doctrine, partial review may be available for separable issues, as to which discretion or expertise is insignificant; this 'vertical' exception usually applies to procedural issues. There are also issues of law which may be reviewed without reaching factual disputes . . .
>
> . . .
>
> There is rarely any justification for holding that an agency action is invariably unreviewable. Most Courts have admitted the possibility of review for claims of unconstitutionality in substance or procedure and for allegations that the agency violated clear statutory duties or exceeded its statutory jurisdiction." Saferstein, "Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion' ", 82 Harv.L.Rev. 367, 370, 372, 398 (Dec. 1968).

The Administrative Procedure Act, Chap. 10, 5 USC §§ 701-706:

> ". . . embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or

> adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute but also for review of final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. § 704." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

See also, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

2. **Direct review of final agency action is constitutionally required.**

The argument advanced by the Board here, that the applicability of a special review statute (Section 10(f) of the National Labor Relations Act, 29 USC §151, et seq.) excludes nonstatutory review, might be of some relevance if CSI had filed the instant petition for review. Although the continued viability of that kind of argument has been seriously questioned by decisional law directed toward assuring the wide availability of judicial review for the challenge of federal "agency action" (e.g., *Califano v. Sanders*, — U.S. —, 51 L.Ed.2d 192 (1977); *Bays v. Miller*, 524 F.2d 631 (9th Cir. 1975)), it is clear such a contention has no applicability where, as in the case now before this Court, *a party* adversely affected by agency action does not have an accessible review statute available to it. Under such extraordinary circumstances, a party (here, The Stouffer Corporation) subjected to "final agency action" (here, denial of "employer status" and contra "unit findings") for which there is no other judicial remedy is entitled to the "basic (constitutional) presumption" of the availability of judicial review. *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 28

L.Ed.2d 136 (1971); *Abbott Laboratories v. Gardner*, supra; *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

The petition for review before this Court asserts, and for purposes of the instant motion must be taken as showing without dispute, that (Petition for Review, paragraphs 1-2):

> The Stouffer Corporation, petitioner here, was a party to and participated in the underlying representation proceedings (9-RC-11305) upon which the Board's Order at 225 NLRB No. 170 is based;
>
> The Stouffer Corporation maintained that it was an employer along with CSI of the employees involved in the representation proceedings and that the grouping sought was not an appropriate unit;
>
> The Board adversely determined the contentions of The Stouffer Corporation;
>
> Such adverse determinations affected and will affect the positions and interests of The Stouffer Corporation not only with respect to Stouffer's Cincinnati Inn but also in connection with other such facilities owned and operated by The Stouffer Corporation with other entities similar in nature and scope to CSI; and,
>
> The actions of CSI foreclosed any method other than the petition for review here through which judicial scrutiny of the Board's final determinations *as to The Stouffer Corporation* can be obtained.

Under the unique fact circumstances set out here, arguments concerning the "traditional" method of review *where available* are simply inappropriate. Such contentions are not applicable to deny the constitutionally mandated requirement of judicial review of final agency action that underlies current decisional law (e.g., *Bethesda-Chevy Chase Broadcasters v. FCC*, 385 F. 2d 967, 968 (D.C. Cir. 1967); *Isenbrandtsen Co. v. U.S.*, 211

F.2d 51, 55 (D.C. Cir. 1954)) particularly where, as here, the "policy" considerations advanced against review (delay of representation proceedings) do not exist See, e.g., Note, "Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals," 88 Harv.L.Rev. 980, 987 (Mar. 1975).

Although inadvertently omitted from the Board's motion and supportive memorandum, the *party status* of The Stouffer Corporation to the representation proceedings and the final, adverse dispositions by the Board of *its* substantive rights and interests are determinative of the propriety of the present review proceeding. Final, adverse affects by agency action are reviewable where "extreme" circumstances exist. *Retail Store Employees Union, Local 954 v. Rothman*, 298 F.2d 330 (D.C. Cir. 1962); Note, supra, at 88 Harv.L.Rev. 987, 993-994. "Extreme" circumstances are unquestionably present in this matter since final Board action has adversely disposed of substantive, statutory rights of The Stouffer Corporation for which agency actions the "traditional" review method is not available under the statutory scheme of the NLRA. *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064 (5th Cir. 1971).

> ". . . [J]*urisdiction af the Federal Courts*, of course, is not absolute. It *exists* only *for the protection of those rights* which Congress intended to be judicially enforceable, and *for which there is no other adequate administrative or judicial remedy*." *Deering Milliken v. Johnston*, 295 F.2d 856, 859 (4th Cir. 1961; emphasis added).

IV. **Conclusion**.

As a party to the underlying representation proceedings, aggrieved by the final Order of the Board adversely disposing of its position and contentions concerning employer status and proper employee unit, The Stouffer Corporation has standing to maintain the instant Petition for Review. Unavailability of

the "traditional" or usual method for review, under the extreme and extraordinary circumstances here, does not displace but in fact enhances the position of The Stouffer Corporation in this matter. Accordingly, the Board's Motion to Dismiss the Petition for Review should be denied particularly where, as here, the complex and substantive issues before the Court demand disposition of this matter on the merits and the record now filed with this Court.

Respectfully submitted,

GERALD TOCKMAN

Dated this 24th day of May, 1977.

[*23] EXHIBIT 1

I didn't talk about a written motion I am sure, Mr. Hearing Officer. I think Mr. Venn is in error on that.

Mr. Venn: I didn't finish. I thought you were going to give him an opportunity to reargue or resubmit——

Mr. Kennedy: Excuse me.

Mr. Venn: A motion on the same subject supported by other evidence. Maybe that's a technicality.

Hearing Officer: I will say it is my understanding a motion will be refiled.

Mr. Kennedy: Restated?

Hearing Officer: Restated?

Mr. Kennedy: Yes.

Hearing Officer: Are you prepared to do that, to restate that motion at this time?

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Mr. Kennedy: Yes. It will be substantially the same.

This is a motion by C. S. I. Company, a limited partnership, and the Stouffer Restaurants and Inns, Division of the Stouffer Corporation to intervene as a party employer in this matter for the reason that the real employer, in fact in law, in this action is the same employer as the employer involved in Case No. 9-RC-10528 which was the subject of an investigation and hearing by the Board beginning on May 24, 1974 and ending on July 1, 1974.

The record as it stands is neither complete nor accurate if the position of the Petitioner is to maintain throughout [24] this hearing—and it's necessary that this Employer have a right to to stand here in the sense that he's more than a bystander, more or less the subject of the testimony as it is adduced by the petitioner.

I don't precisely know what the extent of your last ruling was; and that's why I have tried to add something additional to the motion in the present form by seeking by a motion from you the right to be an actual party to this thing and the right to stand so that what this Employer may say and do will be effective tools in the hands of you as the Hearing Officer and the Regional Director in the decision of this thing.

To that end and in support of that, I am prepared to submit some evidence.

Hearing Officer: Mr. Venn, would you like to be heard on that?

Mr. Venn: Yes, I really honestly feel Mr. Kennedy's motion begs the question here.

I don't deny the record is before the Regional Director on the previous "R" Case hearing. The Petitioner petitioned for an overall unit of all the relevant employees at Stouffer's.

In any event, we petitioned for an overall unit, and their parties agreed that on that basis that the employer, the correct employer, was the employer of the housekeeping * * *

* * * * * * * *

[30] table here a complete copy of the transcript of the record in Case No. 9-RC-10528. Do you wish me to introduce this into the record here or do you have in the Regional files the original copy of this document?

Hearing Officer: We have the originals of that document.

Mr. Kennedy: Are they available to you, sir?

Hearing Officer: They are available at this time.

Mr. Kennedy: Do you want to——

Hearing Officer: I would prefer to have them introduced through a witness at a somewhat later occasion.

Mr. Kennedy: Do you mean this record I am speaking of?

Hearing Officer: Yes, that record constituting 345 pages wherein the record began on May 24, 1974 and closed on July 1, 1974.

Mr. Venn: I would object to the admission of the record at this time.

Hearing Officer: It has not been admitted.

Mr. Venn: All right.

Hearing Officer: I stated that if it is admitted, it will be admitted later through a witness.

Mr. Venn: All right.

Hearing Officer: At this juncture, Gentlemen, I am disposed to grant Mr. Kennedy's motion to intervene on behalf of Cincinnati S. I. Company, a limited partnership, and **[31]** Stouffer Restaurant's and Inns, Division of the Stouffer Corporation,

d/b/a Stouffer's Cincinnati Inn as being taken in the conjunctive rather than in the disjunctive.

That is the party upon whose behalf you wish to intervene at this time, is that correct?

Mr. Kennedy: That's correct.

Hearing Officer: I do this for the purpose of assuring the Regional Director that all possible parties to this hearing will be present and represented throughout the course of this hearing.

It will be the Regional Director's determination whether Cincinnati S. I. Company, a limited partnership, and Stouffer Restaurants and Inns, Division of the Stouffer Corporation, d/b/a Stouffer's Cincinnati Inn or simply Cincinnati S. I. Company, a limited partnership, or any other employing entity constitutes an employer of the employees sought or in an appropriate unit.

Therefore, the motion is granted at this time and I full-well expect we will have extensive record testimony to the corporate relationship of these possibly different corporations.

I am not at this time aware as to whether or not they are separate corporations or a single corporation; but I will expect testimony to be adduced with respect to that and with respect to employer employees, and as to the appropriateness **[32]** of any appropriate bargaining unit.

At a somewhat later time, I would like to see proposed stipulations with respect to commerce with respect to either these employers jointly ar severally as the parties and I determine at that time.

Mr. Kennedy: I was distracted for a moment, Mr. Hearing Officer. Did you say you wanted to have some testimony presented on this?

Hearing Officer: Yes, sir.

Mr. Kennedy: Some testimony?

Hearing Officer: Yes.

Mr. Kennedy: I just wanted to be sure I heard you.

Hearing Officer: You heard me.

Mr. Kennedy: Thank you.

Hearing Officer: Now is it possible for us to proceed?

I will retain Employer's Exhibit 1 at this time and a list of rejected exhibits until such time someone can identify it through sworn testimony and place it in the record.

Mr. Venn, are you prepared to proceed?

Mr. Kennedy: I have some matters I would like to bring before the Hearing Officer, please.

Hearing Officer: Prior to going on with testimony?
What do you wish to bring forward, Mr. Kennedy?

Mr. Kennedy: Are we off the record now?

In the United States Court of Appeals
for the Sixth Circuit

The Stouffer Corporations d/b/a Stouffer's Cincinnati Inn, Petitioner, v. National Labor Relations Board, Respondent.	No. 77-1094

RESPONSE TO PETITONER'S OPPOSITION TO MOTION TO DISMISS THE PETITION FOR REVIEW

In its Opposition to the Board's Motion to Dismiss the Petition for Review (herein "Pet. Opp."), Stouffer argues that the Board's determination that Stouffer is not a joint employer of the employees in the bargaining unit has created an "extreme" circumstance necessitating Court review of the Board's representation decision under Section 10(f) of the Act (Pet. Opp. 10).[1] The "extreme" circumstance cited by Stouffer is the fact that the Board's "joint employer" determination has made it impossible for Stouffer to obtain review by refusing to bargain and awaiting a Board order issued under Section 10(c) of the Act. However, the courts have uniformly recognized that Congress consciously designed Section 10(f) to prevent review of

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[1] Significantly, Stouffer has cited no case in which direct review of a representation decision was permitted under Section 10(f). *Retal Store Employees Union, Local 954 v. Rothman*, 298 F.2d 330 (C.A.D.C., 1962), cited by Stouffer as establishing the proposition that "adverse affects (sic) by agency action are reviewable where 'extreme' circumstances exist" (Pet. Opp. 10) was, in fact, a case in which the court granted the Board's motion to dismiss an action brought in district court (not pursuant to Section 10(f)) to review the General Counsel's refusal to issue an unfair labor practice complaint. *Id.* at 332.

such representation determinations unless they become the subject of a Section 10(c) order and that, as a result, some parties to representation proceedings may be precluded from obtaining review of adverse determinations. See cases cited in the Board's Motion to Dismiss, at pp. 3-4.

In *A.F.L. v. N.L.R.B.*, 308 U.S. 401, 407-411 (1940), which involved a situation analogous to the present case, the Supreme Court held that where the Board's representation decision resulted in the certification of one of two competing unions, the other union could not obtain review under Section 10(f) even though it claimed to represent a majority of the unit employees. There, as here (Pet. Opp. 8-10), the party suffering the adverse determination claimed that due process required review. The Court succinctly rejected this contention: "The argument too that Congress has infringed due process by withholding from federal appellate courts a jurisdiction which they never possessed is similarly without force." *A.F.L. v. N.L.R.B., supra,* 308 U.S. at 412. See also, *Local 542, Int'l Union of Operating Engineers v. N.L.R.B.*, 328 F.2d 850, 853-854 (C.A. 3, 1964), cert. denied, 379 U.S. 826.

Indeed, it is apparent that the same reasons noted by the Court in the *A.F.L.* case for Congress' decision to preclude review of representation decisions absent a Section 10(c) order are present here. Thus, Congress weighed the benefits of permitting direct court review of representation determinations against "the long delays . . . resulting from applications to the federal appellate courts for review of orders for elections" (*Id.* at 409-410) and "made a deliberate choice of conflicting policies" (*Id.* at 411) to preclude review. Stouffer contends (Pet. Opp. 6) that no "delay" considerations exist in the present case. On the contrary, the identical "delay" factors in the *A.F.L.* case are present here: If the Board's representation decision were subject to review, the bargaining relationship between C.S.I. and the Union

—neither of whom seek review—would be inhibited by the possibility of the substitution of a new party to the bargaining relationship or else by the potential for another election.

In any event, Stouffer's interests under the Act have not been injured, for Stouffer suffers no legal harm until the Board issues an order against it arising out of unfair labor practice charges. Should Stouffer be subjected to a Section 10(c) order that involved its supposed "joint employer" status, it would, of course, be able to obtain review of that issue under Section 10(e) or (f). To be sure, the negotiation of a contract between C.S.I. and the Union may have some "practical" impact on Stouffer's dealings both with its employees who work with the C.S.I. employees and with C.S.I. itself, but this is merely an incidental result of the Board's representation determination, not unlike the effect that the negotiation of a bargaining agreement by a subsidiary corporation might have on the parent corporation. Such an interest is not sufficient to allow the incidentally affected party the right to seek review under Section 10(f).[2]

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[2] Stouffer contends (Pet. Opp. 2) that Rule 8 of this Court's Local Rules Supplementing the Federal Rules of Appellate Procedure required the filing of the Board's motion to dismiss herein within fifteen days after Stouffer filed its petition for review. The apparent purpose of Supplementary Rule 8 is to require an appellee to bring to the Court's attention promptly any procedural defects in the manner in which the jurisdiction of the Court has been involved—for example, the filing of an untimely notice of appeal. The Rule cannot reasonably be interpreted to mean that subject matter jurisdiction is automatically conferred on this Court unless an objection is raised within 15 days. Cf. Rule 12(h)(3), F.R.Civ.P., which states that a defense of lack subject matter jurisdiction can be raised at any time. See also, *Jordon v. Gilligan*, 500 F.2d 701, 704, 710 (C.A. 6, 1974).

In any event, Stouffer fails to note that Local Rule 8 also provides that the Court may waive the fifteen-day requirement *sua sponte*. Since, as demonstrated in our original moving papers and above, this Court has no jurisdiction to entertain a petition for review of the Board's representation decision, the interests of conserving judicial and administrative resources warrant granting the Board's motion to dismiss and waiving the fifteen-day requirement of Local Rule 8.

Respectfully submitted,

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Dated: Washington, D.C.
June 2, 1977

In the United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn, Petitioner, v. National Labor Relations Board, Respondent.	No. 77-1094

INTERVENOR'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW

I. Preliminary Statement

To the extent that any confusion may exist as to the procedural posture of this review proceeding[1] Intervenor offers the following brief statement of pertinent facts. Intervenor (herein the "Union") petitioned for an election among employees of Cincinnati S.I. Company (herein "CSI"), a limited partnership owning and operating Stouffer's Cincinnati Inn, Cincinnati, Ohio pursuant to a license agreement with the Stouffer Corporation (herein "Stouffer"). Stouffer operates the restaurant facilities at the Inn under a lease with CSI as well as providing food and beverage service at banquet functions. The Union did not petition for an election among the employees employed by Stouffer's at the Inn, only those employed by CSI. Stouffer sought and was granted leave to intervene in the representa-

[1] Petitioner claims that its status as an intervening party in the Board representation proceeding was not made clear in the Board's motion and supporting memorandum.

tion proceeding before the Board. Stouffer urged two positions in that proceeding, namely, that it was the joint employer (with CSI) of the CSI employees the Union was petitioning for, and that the only appropriate unit for an election was one encompassing the employees of CSI as well as those of Stouffer employed at that Inn. The Board rejected both contentions finding that Stouffer was not a joint employer of the CSI employees and that a unit limited to CSI employees was appropriate, both as urged by the Union. Subsequently, the Board conducted an election among the CSI employees and the Union was successful and was thereafter certified as the bargaining agent of those employees. CSI and the Union then entered into a collective bargaining agreement effective December 5, 1976 through December 4, 1979 covering the CSI employees. No Stouffer employees are covered by that agreement. As Petitioner notes, CSI did not choose to seek review of the Board's decision by refusing to bargain with the Union and precipitating unfair labor practice charges leading to enforcement proceedings by the Board in this Court.

Despite this latter fact, Stouffer nevertheless seeks to have this Court review the Board's order, urging that it is entitled to such relief pursuant to 29 U.S.C. Section 160(f) and 5 U.S.C. Section 704. Intervenor joins with the Board in seeking dismissal of the petition and offers the following points all of which are fully discussed hereinafter.

1. Petitioner has no right of review under 29 U.S.C. Section 160(f).

2. Petitioner has no right of review under 5 U.S.C. Section 701, et seq.

3. To the extent that Petitioner has any review rights under 5 U.S.C. 701, et seq., only a district court can entertain such an action under very limited circumstances not present here.

4. Petitioner is in error in urging that it has a constitutional right of review.

5. Review of the kind urged is directly contrary to the espoused congressional policy favoring expeditious resolution of NLRB representation matters.

6. The authorities cited by Petitioner do not support its claimed right to review.

II. Argument

A. The board's decision and direction of election is not reviewable under Section 10(f)[2] of the Act.

In *NLRB v. International Brotherhood of Electrical Workers*, 308 U.S. 413 (1940), a companion case to *AFL v. NLRB*, 308 U.S. 401 (1940) referred to in the Board's memorandum, the Supreme Court held,

> ". . . The direction for an election is but a part of the representation proceeding authorized by Section 9(c) and is no more subject to review under Section 10(f) than is a certification which is the final step in such a proceeding and which we have just held Congress has excluded from the review afforded by that subdivision." (p. 414)

That decision has not been disturbed in the thirty-seven years since it was issued and Petitioner has offered no authority to the contrary. For this reason and the several reasons advanced by the Board it is patently clear that Petitioner has no right of review under Section 10(f).

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[2] 29 U.S.C. 160(f).

B. Petitioner has no right of review under 5 U.S.C. Section 704.

Petitioner argues that the "traditional" method of review is not the only avenue of review and apparently[3] that either the circuit courts should directly review Board representation decisions under Section 10(f) (despite the Supreme Court's unqualified pronouncements discussed above) or directly review such decisions under 5 U.S.C. Section 701, et seq. of the Administrative Procedure Act. Since the "traditional" method is the *only* method under Section 10(f) it is presumed that Petitioner is asserting an independent right of review under the Administrative Procedure Act. That argument, too, has no merit whatsoever.

First of all, that same argument has been rejected by this Circuit in a previous decision. In *Timken-Detroit Axle Co. v. NLRB*, 197 F.2d 512 (CA 6, 1952) the Court specifically found that it did not have power under either the National Labor Relations Act, Sections 159(c)(3) and 160(f) of Title 29, *or* the Administrative Procedure Act, Chapter 7, to review an order of the NLRB in a representation proceeding.

Second, that chapter of the Administrative Procedure Act begins with this caveat, Section 701(a)(1):

> "This chapter applies according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review;"

The several courts that have interpreted this provision have emphasized that Chapter 7 of that Act was not intended to

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[3] It is unclear from Petitioner's memorandum, pp. 4-8, whether it is urging review (other than the "traditional" method of review) under Section 10(f) and 5 U.S.C. Section 704 or whether it is urging the Court to directly review the Board's order pursuant to 5 U.S.C. Section 704, only.

expand the right of review. See e.g. *Caulfield v. U.S. Dept. of Agriculture*, 293 F.2d 217 (CA 5, 1961); cert. den. 369 U.S. 858; *Califano v. Sanders*, 51 L.ed 2d 192 (1977). In *Kirkland v. Atlantic Coastline R. Co.*, 167 F.2d 529 (CA DC, 1948); cert. den. 335 U.S. 843, it was held that review is not available under Section 10 (Administrative Procedure Act) where a statute, "as judicially interpreted", precludes it. See also, *Airline Dispatchers Assn. v. National Mediation Board*, 189 F.2d 685, cert. den. 342 U.S. 849. In that connection the Court will note that beginning with the decision in *AFL v. NLRB*, supra, those courts that have interpreted Section 9 of the NLRA have consistently held that Congress, in fact, intended to preclude judicial review of representation proceedings except as an incident to review of an order entered in an unfair labor practice proceeding. In *Fitzgerald v. Douds*, 167 F.2d 714 (CA 2, 1948), for example, the Court stated,

> "The Act nowhere authorizes a direct review of a representation order, or of a 'decertification' order under the Act as amended. It does, however, provide an indirect review in section 9(d) which directs that when an order under section 10(c) prohibiting an unfair labor practice has been based in part upon a certification following an investigation pursuant to section 9(c) and is to be enforced or reviewed under section 10(e) or 10(f) the record of the certification and investigation shall be included in the transcript. *A majority of the court believes that Congress has dealt in section 9(d) with reviews of certification and 'decertification' and has provided therein the only relief it means to grant on that subject.*" (emphasis supplied)

In deciding that representation matters under the Railway Labor Act were likewise excluded from judicial review, the Supreme Court made the following observation germane to

this same question in *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 337 (1943),[4]

> "In view of the pattern of this legislation and its history, the command of the Act should be *explicit* and the purpose to afford a judicial remedy *plain* before an obligation enforceable in the courts should be implied." (emphasis supplied)

Despite the myriad of cases of like import, Petitioner nevertheless maintains that the Board's decision is "final" as to it (as that term is used in the Administrative Procedure Act) and therefore review is required by that Act. That contention is likewise untenable for several cogent reasons. Petitioner argues that the Board's order is "final", not by its own terms, but because CSI "accepted" the order, i.e., did not seek review. (Petitioner's Memo, p. 4) It also makes the rather facetious assertion that because Congress did not see fit to make representation proceedings subject to review under the Act, it therefore follows that the Board's action is final and as a result should be reviewable. (Petitioner's Memo, p.7) Both contentions dramatically demonstrate the inherent weaknesses in Petitioner's basic argument. It is true that CSI accepted the Board's decision and subsequently recognized, bargained and entered into a contract with the Union. That fact, however, aptly demonstrates not only the correctness of the Board's decision, but that, in fact, the Board's order was *not* final as to Petitioner.

An order of an administrative agency is final only if it (1) imposes an obligation, (2) denies a right, or (3) fixes some legal relationship as a consummation of the administrative process. *Cities Service Gas Co. v. Federal Power Commission*, 255 F.2d 860 (CA 10, 1958), cert. den. 358 U.S. 837. Whether

[4] A companion case to the landmark *Switchman's Union v. National Mediation Board*, 320 U.S. 297 (1943).

an action is final depends not on the label affixed but on a realistic appraisal of the consequences of the action. *Isenbrandtsen Co. v. U. S.*, 211 F.2d 51 (CA DC, 1954), cert. den. 347 U.S. 990. What occurred in this instance was that Petitioner intervened in a representation proceeding and urged the Board to accept two contentions, i.e., that it jointly employed CSI's employees and that the unit sought by the Union was inappropriate. The Board rejected both contentions. The effect of its decision was to impose an obligation on CSI (to recognize and bargain with the Union) and to establish a legal relationship between CSI and the Union (as the bargaining agent for CSI's employees). That order, however, left Petitioner in the identical position it was in *prior* to the proceeding. It acquired no obligations to the Union as a result of the order, it was denied no rights, nor was any legal relationship between it and the Union created. All that happened, consistent with the purposes of the Act,[5] was that CSI employees were given the opportunity to designate a representative of their own choosing with whom their employer (CSI) is obligated to bargain. Petitioner, in contrast, is not obligated to recognize the Union, has no employees represented by the Union, and, in fact, can point to no rights belonging to it that were denied. It makes only vague allusions to the "positions" and "interests" of the Stouffer Corporation being affected, and even goes so far as to speculate that its position and interests at *other* facilities owned by it may be affected. This is clearly insufficient evidence to show a denial of any significant legal rights and does not support its claim that "substantive statutory rights of the Stouffer Corporation have been adversely disposed of by Board action."

[5] The overriding policy of Section 9 of the Act is in favor of the interest of employees to be represented by representatives of their own choosing for the purposes of collective bargaining *NLRB v. Western Southern Life Ins. Co.*, 391 F.2d 119, cert. den. 393 U.S. 978; *NLRB v. Sun Shipbuilding & Dry Dock Co.*, 135 F.2d 15 (CCA, 1943). This is precisely why *factual* determinations such as joint employer and appropriate unit issues are committed to the Board's discretion.

C. **Petitioner had a limited right of review in a district court under 5 U.S.C. Section 704, but not in the circuit court.**

As the Board noted in its memorandum, footnote 3, there are certain instances, albeit very few, where direct review of Board representation cases can be had in the *district courts*. Those instances have, to date, been judicially limited to three distinct areas. The Board refers to two, cases where the Board's order contravenes a specific prohibition of the Act, *Leedom v. Kyne*, 358 U.S. 84 (1958) or where Board action creates international problems for the government. *McCulloch v. Sociedad National*, 372 U.S. 10 (1962). A third exception involves Board action which violates the Constitution.[6] *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704, 708 (CA DC, 1965). None of these exceptions is present in this case, and in any event, such actions in whatever form may only be filed in the district court. *School Board of Broward Co. v. Dept. of H.E.W.*, 475 F.2d 1117 (CA 5, 1973).

D. **Petitioner is in error in urging that it has a constitutional right of review.**

Petitioner urges that judicial review is "constitutionally mandated" by "current decisional law". (Petitioner's Memo, p. 10) Even in the broadest sense, that assertion is incorrect. Except where the Constitution requires it, judicial review may be granted or withheld as Congress chooses. *Estep v. U.S.*, 327 U.S. 114; *Carlson v. Landon*, 342 U.S. 524; *Fong Yue Ting v. U.S.*, 149 U.S. 698; nor are appeals allowed as a matter of right. *Pote (Station WLOE) v. Federal Radio Commission*, 67 F.2d 509, cert. den. 290 U.S. 680. It is also well-established that the right of review is not an essential element of due process of law. *Reetz v. Michigan*, 188 U.S. 505; *AFL v. NLRB*, supra.

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[6] Not to be confused with Petitioner's claim that a right of review is constitutionally mandated (covered herein under subheading D).

Petitioner also argues, in essence, that it would be unjust to deny it a right of review in this instance. It repeatedly refers to the "extraordinary" circumstances present in this case. In reality what Petitioner is claiming is that because CSI accepted the Board's decision and recognized and bargained with the Union rather than seeking review of that decision, it is unfair to deny Petitioner a right of review under such circumstances. A similar argument was made in *International Union of Operating Engineers, Local 148 v. International Union of Operating Engineers, Local 2*, 173 F.2d 557. In denying a right of review to two unions which sought to enjoin the holding of a representation election the Court answered,

> "The arguments of appellant as to the injustice of precluding rival labor unions from obtaining a judicial review of adverse rulings of the Board in representation proceedings 'are arguments to be addressed to Congress and not the courts.' " Citing *AFL v. NLRB*, supra.

Unions have frequently made the same argument in cases where they sought direct review of Board dismissals of representation petitions. As one circuit court observed in *A.G.M. Workers Assn. v. NLRB*, 117 F.2d 209 (CA 7, 1940) in rejecting the union's right of appeal,

> ". . . The Supreme Court has removed all doubt from the question and left us with no discretion when it said in American Federation of Labor v. Labor Board, 308 U.S. 401, 411: 'It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected. But these arguments are to be addressed to Congress and not to the courts."

E. **Review of the kind urged here is directly contrary to the espoused congressional policy favoring expeditious resolution of NLRB representation matters.**

Petitioner makes the rather facetious assertion that the "policy" considerations advanced against review (delay of representation proceedings) do not exist" in this case. On the contrary, it is patently clear that to grant review under the circumstances of this case would not only delay endlessly the resolution of representation matters but would create a chaotic situation as exemplified by this very case. Here, the NLRB election occurred on October 8, 1976 and the Intervenor was certified as the bargaining representative on October 18, 1976. It entered into a contract with CSI on December 28, 1976. Petitioner did not file its Petition for Review until February 11, 1977. Thus, if a right of review exists in this case, conceivably CSI and the Union could be well into the second full year of their collective agreement before a final decision was made by this Court. Assuming arguendo that Petitioner was successful on its petition the collective bargaining relationship between CSI and the Union would be totally disrupted, the collective agreement could be invalidated and the membership dues paid to the Union pursuant to the union security and check-off provisions conceivably would have to be repaid. Instead of furthering the policies of the Act in preventing industrial strife which interferes with the free flow of commerce and fostering peaceful collective bargaining as an alternative to such strife, review under these circumstances would inordinately delay resolution of representation matters and have just the opposite effect.

F. **The authorities cited by petitioner do not support its claimed right of review.**

The authorities cited by Petitioner offer little support for its claimed right of review in this instance. In *Bays v. Miller*, 524

F.2d 631 (CA 9, 1975), the principals of *AFL v. NLRB*, supra were reaffirmed. In addition, the Court quoted from *Leedom v. Kyne*, supra, as follows:

> "[J]udicial review of a final agency action by an aggrieved person will not be cut off *unless there is persuasive reason to believe that such was the purpose of Congress.*" (emphasis supplied)

Consistent with that quotation there is, in this instance, substantial evidence of a congressional purpose to withhold judicial review of Board representation proceedings. Also in *Bays*, the Court will note that the action was initiated in the district court not the circuit court.

Petitioner cites *Califano v. Sanders*, 51 L.ed. 2d 192 (1977), for the proposition that current decisional law is "directed toward assuring the wide availability of judicial review for the challenge of federal agency action." In fact, that case holds just the opposite. Although the Seventh Circuit held that the Administrative Procedure Act should be construed as containing an independent grant of subject matter jurisdiction, the Supreme Court reversed holding that such Act did *not* constitute an implied grant to federal district courts of subject matter jurisdiction to review agency actions.

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Court specifically found that there was no indication in the statute[7] that Congress sought to prohibit judicial review. The Court further observed that there was no showing of clear and convincing evidence of a legislative intent to restrict access to judicial review. Clearly, that is not the case regarding Section 9 of the NLRA.

In *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064 (CA 5, 1971), cited by Petitioner on page 10 of its Memo the

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[7] Department of Transportation Act of 1966.

jurisdiction of the district court was founded on *Leedom v. Kyne*, supra,—again an exception not present here.

Finally, in *Retail Store Employees Union, Local 954 v. Rothman*, 298 F.2d 330 (CA DC, 1962), a union brought suit in the district court alleging an abuse of discretion on the part of the General Counsel of the Board in refusing to issue a complaint in an unfair labor practice proceeding. Clearly that case is no precedent for the review requested here.

III. Conclusion

For all of the foregoing reasons, it is respectfully submitted that the Petition for Review herein should be dismissed for lack of jurisdiction.

Respectfully submitted,

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(513) 621-7161
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In the United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation, d/b/a Stouffer's Cincinnati Inn, Petitioner, vs. National Labor Relations Board, Respondent.	No. 77-1094

MOTION TO EXTEND TIME FOR FILING BRIEFS AND APPENDIX

Comes now Intervenor, Hotel, Motel, Restaurant Employees and Bartenders Union, Local No. 12 and Respondent, National Labor Relations Board, and join in the following request pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure to extend the time for filing of briefs by all parties herein, and the filing of the appendix, until such time as the Court has ruled on the pending motion by Respondent National Labor Relations Board to dismiss the Petition for Review.

As grounds for this motion, Intervenor states:

1. Respondent National Labor Relations Board filed a motion to dismiss the within Petition for Review on or about April 29, 1977. Respondent's motion raises the threshold issue of the Court's jurisdiction to entertain the within petition.

2. Petitioner filed its opposition to Respondent's Motion to Dismiss on May 24, 1977. Respondent National Labor Relations Board filed its response thereto with the Court on or about June 2, 1977; and Intervenor filed its memorandum in support of said motion to dismiss on or about June 3, 1977.

3. In accordance with the order of the Clerk filed June 23, 1977, Petitioner has been granted to July 26, 1977 to file its brief on the merits and the appendix.

4. The appendix in this instance will include the entire transcript of the underlying representation proceeding together with approximately 95 exhibits. The transcript in the representation proceeding exceeds 1400 pages. Counsel was informed as of the filing of this motion that Petitioner has not delivered the appendix for printing or otherwise begun preparation thereof so that the delayed briefing schedule requested herein will not in any way prejudice Petitioner. Further, Petitioner has requested that Respondent and Intervenor join in an agreed order permitting Petitioner to file the appendix in accordance with the alternate deferred method provided by Rule 30(c) of the Federal Rules of Appellate Procedure. Respondent and Intervenor have agreed with Petitioner to join in such an order.

5. Because of the nature of the issue raised by Respondent's motion and in the interest of judicial economy, Intervenor and Respondent respectfully represent to the Court that it would be more expedient for the Court to rule on the pending motion prior to the filing of briefs by all parties and the preparation and filing of the voluminous appendix involved herein. Clearly, if the Court grants the motion that will end the matter insofar as this Court is concerned and all parties would be spared the substantial additional time, effort and expense involved in the preparation of briefs on the merits and the substantial additional expense to Petitioner involved in the preparation and filing of the appendix. Should the Court overrule the motion, a new briefing schedule could then be ordered and the appendix and briefs of all parties on the merits filed within a reasonable time thereafter.

6. This motion is made in good faith and not for the purposes of delay.

WHEREFORE, for the foregoing reasons, Intervenor requests the Court to grant the within motion and to extend the time for filing of briefs herein by all parties, and the filing of the appendix, indefinitely, pending a ruling by the Court on Respondent's Motion to Dismiss.

Dated this 15 day of July, 1977.

Respectfully submitted,

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ELLIOTT MOORE
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77-1094

United States Court of Appeals for the Sixth Circuit

The Stouffer Corporation, d/b/a Stouffer's Cincinnati Inn, Petitioner,

vs.

National Labor Relations Board, Respondent,

Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 12 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Intervenor.

ORDER

Before Weick, Edwards and Celebrezze, Circuit Judges.

Respondent National Labor Relations Board moves to dismiss the petition for a review of a Board order on the grounds of lack of jurisdiction. The order for which review is sought concluded the petitioner was not a joint employer with Cincinnati S.I. Company (CSI) of CSI's employees and ordered a representation election among CSI's employees alone. The respondent asserts that such certification proceedings are not reviewable under a line of Supreme Court decisions commencing with *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401 (1940).

Upon consideration of the respondent's motion and the memoranda of the petitioner in opposition and the intervenor in support thereto, this Court sees no reason in this case to de-

part from the longstanding rule that certification proceedings cannot be reviewed in a Court of Appeals and therefore, it is ORDERED that the motion to dismiss be and it hereby is granted. See *Eastern Greyhound Lines v. Fusco*, 323 F.2d 477 (6th Cir. 1963); *Timken-Detroit Axle Co. v. National Labor Relations Board*, 197 F.2d 512 (6th Cir. 1952).

Entered by Order of the Court

JOHN P. HEHMAN
Clerk

In The
United States Court of Appeals
For the Seventh Circuit

No. 77-1094

The Stouffer Corporation, d/b/a
Stouffer's Cincinnati Inn,
Petitioner,

v.

National Labor Relations Board,
Respondent.

Petition for Rehearing and Suggestion
For Rehearing En Banc

Preliminary Statement

The Stouffer Corporation d/b/a Stouffer's Cincinnati Inn (Petitioner herein) respectfully petitions the Court for rehearing of its Order dated July 15, 1977 granting the Motion of the National Labor Relations Board (Respondent herein) to dismiss Petitioner's petition for review of an Order entered by Respondent Board in the matter known as "Cincinnati S. I. Company, a Limited Partnership d/b/a Stouffer's Cincinnati Inn", 225 NLRB No. 170 (Case No. 9-RC-11305). Petitioner further suggests, for the reasons hereinafter outlined, that rehearing be held by this Court sitting *en banc*.

In the July 15, 1977 Order of Circuit Judges Weick, Edwards and Celebrezze, this Court concluded:

(a) That this Petitioner could not obtain review of an Order in a certification proceeding denying its status as a joint employer of employees for whom an election was ordered; and,

(b) That this case presented no reason for departure from "the longstanding rule" that certification proceedings cannot be reviewed in a Court of Appeals.

Statement of the Facts

Petitioner, a party to the underlying representation proceeding before Respondent that resulted in the Order for which review is sought, was foreclosed from the usual, "longstanding" method of obtaining review of that Order simply because another party to that proceeding (The Cincinnati S.I. Company, herein "CSI") accepted the Respondent's Order. Such "acceptance", if this Court's Order stands, makes unreviewable final decisions of Respondent that Petitioner is not a joint employer of employees at Stouffer's Cincinnati Inn and that a segmented unit of employees found to be the employees of CSI "only" constitutes a unit appropriate for collective bargaining. Since no other avenue for review of these final determinations of Petitioner's substantive rights to employer status and freedom from arbitrary and unsupportable unit determinations is available under the unique circumstances present here, references to the "traditional method" of review generally available to aggrieved employers and to the "longstanding" rule that accompanies such method do not deal with the plain facts that Petitioner is "finally aggrieved" and has asserted a due process right to judicial review.

I. **Review would not require departure from "longstanding" rule or precedent.**

The authorities cited by the Court in its Order are not dispositive under the circumstances here. In *American Federation of*

Labor v. National Labor Relations Board, 308 U.S. 401 (1940), the union involved there was not a party to the underlying representation proceedings when it sought review of a Board unit determination. The union did not claim it had been denied any statutory rights by direct operation of the Board's Order, as is the case before this Court. Further, the Supreme Court's decision in that case, in substantial part, turned upon congressional policy against delay in representation proceedings. In the matter before this Court, by contrast, Petitioner was a party to the underlying Board proceeding and this review proceeding does not bring into operation policy considerations with regard to delay or "circumvention" of representation proceedings. Finally, the Court's decision in *American Federation of Labor* is not applicable to the situation here which fits within subsequent decisions carving out exceptions to "usual rules" against review, expanding the presumptive availability of review and granting review in cases like the present where no other recourse from final agency action exists. E.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); *Deering Millikan v. Johnston*, 295 F.2d 856, 859 (4th Cir. 1961).

Eastern Greyhound Lines v. Fusco, 323 F.2d 477 (6th Cir. 1963), also cited in this Court's Order, is not applicable to the issues here. That decision assumes that the "traditional" method of obtaining review is available to parties before the Board and that "policy" considerations directed at avoiding delay of Board Orders are present. Extraordinary circumstances like the case here in which the litigation rights of a party are denied the "traditional" review generally available (under 29 USC §§ 159(d) and 160(f)) were neither present nor considered in *Eastern Greyhound Lines*. *Timken-Detroit Axle Co. v. NLRB*, 197 F.2d 512 (6th Cir. 1952), similarly, did not deal with the kind of "extreme" situation presented in this case involving a final denial of statutory rights. On the contrary, in *Timken-Detroit* there was no issue of employer status and review was not available in circumstances where even the "traditional method" could not be allowed.

II. "Parties" must not be denied review when aggrieved by final agency orders denying substantive statutory rights.

The critical issues of law and policy involved in the case at bar were not fully considered in the Court's Order denying review. Those issues must be addressed. In this respect, analysis of the facts shows that the most crucial consideration with regard to reviewability of agency orders, e.g., "finality", is present under the extraordinary circumstances here.

A "final agency order" is one which denies a right, establishes or affects a legal relationship or imposes an obligation. *Cities Service Gas Company v. Federal Power Commission*, 255 F.2d 860 (10th Cir.), cert. denied, 385 U.S. 837 (1958). "Finality", and thus reviewability, must be evaluated through a "realistic appraisal" of the consequences of agency action. *Isbrandtsen Company v. U.S.*, 211 F.2d 51 (D.C. Cir.), cert. denied, 347 U.S. 990 (1954). These criteria, when fully considered and applied to the facts of this case, demonstrate the "finality" of Respondent's Order with respect to this Petitioner and substantiate Petitioner's contention that review is the only proper judicial response to the unique, extraordinary and extreme circumstances before this Court.

The essential facts to be considered are that by direct operation of the Board's Order, Petitioner has been denied all rights to effectively set standards for and directly affect the employment conditions of employees Petitioner maintains are its employees. Petitioner, in this regard as well as through the unit determination flowing from interdiction of its "employer rights", is aggrieved and, in the absence of the "traditional" or any other accessible means of review, faced with "agency finality". In addition, Petitioner's legal relationships with CSI are inevitably altered vis-a-vis Petitioner's now diminished and perhaps nonexistant ability to affect the terms and conditions of employment of persons found by Respondent to be employees of CSI alone.

A "realistic appraisal" of these conditions, together with Petitioner's inability to seek "traditional" review, conclusively establishes the finality of Respondent's Order for which review is sought in this Court.

On the basis of the facts and authorities summarized here, it is clear that Respondent's Order, which denies and is "final" with respect to the statutory rights of Petitioner, is distinguishable from those "typical" situations where Board determinations have lacked finality because a party failed to or chose not to avail itself of the "traditional" method of review. The exceptional and extreme circumstances of this case, involving a final order which denies the substantive rights of a party to the Board proceedings and an unforeseen foreclosure of the method of review provided by Congress, presents a situation neither contemplated or intended by Congress or previously dealt with by the courts. Accordinaly, the petition for review here must be evaluated on its own merits rather than by easy reference to "longstanding" but inapposite precedent.

The rationale most often advanced for denying review is that the Order for which review is sought is not "final" as to the petitioning party. A primary and implicit basis for such "non-finality" determination is that "traditional" review (e.g., refusal to bargain) will be available if the party chooses to exercise it and that delay or circumvention of Board certification orders by permitting review would thwart the policy of the Act. Cf., *Boire v. Greyhound Corporation*, 376 U.S. 473 (1964); *Bays v. Miller*, 524 F.2d 631 (9th Cir. 1975); S. Rep. No. 573, 74th Cong., 1st Sess. 14; H. Rep. No. 972, 74th Cong., 1st Sess. 20. Neither the policy considerations against delay nor any assumption that "traditional" review will be available to Petitioner are present here. "Traditional" review is admittedly not possible because of the "acceptance" of the complained-of Order by CSI and "delay" will not result from the review sought in this case. On the contrary, review would result in a rightful rejection of an arbitrary and unsupportable Board order, vindicate the Statutory rights of Petitioner concerning its asserted employer status and place Intervenor Union in the position it would have occupied had a "traditionally-reviewable" Order been issued.

The general availability of "traditional review" of final Board Orders in more "typical" situations should be found to evidence the clear intent of Congress to provide an accessible means of review to aggrieved parties when "finality" of agency action is conclusively established. Unavailability of "traditional" review under unique circumstances neither intended nor contemplated by Congress, particularly where the unquestioned and extreme effect of the Board's order is to finally deny statutory rights conferred by Congress, demands review. In the instant case Respondent's final denials of Petitioner's asserted rights requires rehearing by this Court sitting *en banc* with full consideration of the critical issues of law and fact raised here but neither considered nor dealt with in the Court's Order of July 15. Submission of briefs on the merits of the issues raised in the petition for review, accordingly, should be directed.

III. The Constitutional Requirement of Direct Review.

Critical constitutional questions concerning the availability of direct review under the unique and extraordinary circumstances of this case should have been, but were not, considered by the Court in its Order. That Petitioner has no other judicial or administrative remedy available to it other than review by this Court is beyond question. Nor can it be seriously controverted that the only established policy reasons for precluding review ("delay" and "circumvention") do not apply to the facts here. When these facts are considered in conjunction with the obviously final "disposition" made of Petitioner's asserted statutory rights and the unavailability of "traditional" review under unique circumstances neither intended nor contemplated by

Congress, critical and heretofore unconsidered questions of this Court's inherent power of review and Petitioner's due process rights to such review are raised and must be fully considered. *Abbott Laboratories v. Gardner*, supra; *Retail Store Employees Union, Local 954 v. Rothman*, 298 F.2d 300 (D.C. Cir. 1962); *Deering Millikan v. Johnston*, supra at 859. Where it is asserted and shown, as here, that judicial review has not been intentionally "withheld" by Congress and extreme circumstances have combined to adversely affect and divest a party of statutory rights to which it claims entitlement, review cannot be denied. *Templeton v. Dixie Color Printing Co.*, 44 F.2d 1064 (5th Cir. 1971).

In the unique circumstances present here and absent an express statutory prohibition of judicial review, such review should be afforded where no "clear and convincing" evidence that Congress sought to limit or prohibit review is shown. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, supra. The established "finality" of Respondent's Order here with respect to Petitioner's asserted rights underscores and enhances its claim of reviewability and the critical nature of the issues and principles before this Court which were not fully considered or applied in this Court's Order.

Current decisional law evidences an undeniable trend toward and expansion of the rights of aggrieved parties to seek review. The import of such decisions must not be lightly taken where, under the kind of extreme and unforeseen circumstances present in this case, denial of review will result in the abrogation of rights conferred by Congress. This is particularly the case where, as here, there are no "policy" reasons for withholding review. *Citizens to Preserve Overton Park v. Volpe*, supra; *Abbott Laboratories v. Gardner*, supra; *U.S. v. Storer Broadcasting*, 351 U.S. 192 (1956); *Bethesda-Chevy Chase Broadcasters v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967); *Isbrandtsen Co. v. U.S.*,

211 F.2d 51, 55 (D.C. Cir.), cert. denied, 347 U.S. 990 (1954).

Critical questions which directly relate to the jurisdiction of this Court, and which cannot be answered by reference to "long-standing rule", are present in this case. Those questions, and the principles which favor review under the unique and extraordinary circumstances set out above were neither fully considered nor applied in the Court's Order of July 15. It is therefore respectfully requested that rehearing be granted and that because of the exceptional importance of the issues presented, that rehearing be held by this Court sitting *en banc*.

IV. **Rehearing should be granted in order to avoid substantial injustice and prejudice to petitioner.**

Before this Court's Order of July 15, 1977, Petitioner incurred substantial expense, time and effort preparing its now-completed Brief on the merits of this case. That Brief was finalized pursuant to Order of Court on June 23, 1977 directing Petitioner to file its Brief on or before July 26, 1977, and following this Court's Order of April 29, 1977 directing Respondent to file its certified list in lieu of the record. These circumstances, together with the extraordinary, novel and critical issues described here, show that rehearing should be ordered to avoid substantial injustice and prejudice to Petitioner and that rehearing should be held with this Court sitting *en banc*.

V. **Conclusion**

Critical principles, issues and facts are raised in this Petition for Rehearing and Suggestion for Rehearing *En Banc* as well as in the pleadings heretofore filed with this Court which were not fully considered in the Court's Order of July 15, 1977. These principles, issues and facts directly relate to and raise previously unconsidered questions concerning the jurisdiction

of this Court to fully consider and grant the review sought in the petition for review filed by Petitioner on February 14, 1977. The issues and principles raised are of exceptional importance not only with respect to the right of this Petitioner and other employers to seek vindication of statutory rights denied by the Board where "traditional" review is rendered unavailable by extraordinary circumstances, but also with regard to the equally critical question of the due process rights of parties to Board proceedings to seek review when aggrieved by final agency action under circumstances clearly showing that review would not hamper or violate any Congressional policy which might otherwise limit review.

For the reasons set out here, the Court is respectfully requested to grant this Petition for Rehearing and to review its Order of dismissal sitting *en banc*.

Dated this 27th day of July, 1977.

Respectfully submitted,

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No. 77-1094

United States Court of Appeals
For the Sixth Circuit

The Stouffer Corporation, d/b/a Stouffer's Cincinnati Inn,
v. Petitioner,
National Labor Relations Board,
Respondent,
Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 12, etc.,
Intervenor.

ORDER

Before: Weick, Edwards and Celebrezze, Circuit Judges.

No active Judge of this Court having requested that a vote be taken on the suggestion that the petition for rehearing be heard en banc, said petition was referred to the panel for consideration and was found not to be well taken.

It Is Therefore Ordered that the petition for rehearing be and it is denied.

Entered by Order of the Court.

JOHN P. HEHMAN
Clerk

STATUTES INVOLVED

National Labor Relations Act
(61 Stat. 136, 29 U.S.C. Sect. 151, et seq.)

Sec. 2(2), 29 U.S.C. § 152(2):

When used in this Act [29 USC §§ 151-158, 159-168]—

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 USCS §§ 151-163, 181-188], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Sec. 8(a)(5), 29 U.S.C. § 158(a)(5):

(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS § 159(a)].

Sec. 9(b), 29 U.S.C. § 159(b):

Determination of bargaining unit by Board. The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [29 USCS §§ 151-158, 159-168], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and

employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Sec. 9(c), 29 U.S.C. § 159(c):

Hearings on questions affecting commerce—Rules and regulations. (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsec. (a) of this section], or

(ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsec. (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsec. (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [29 USCS § 160(c)].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [29 USCS §§ 151-158, 159-168] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballots receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

Sec. 9(d), 29 U.S.C. § 159(d):

Petition for enforcement or review—Transcript. Whenever an order of the Board made pursuant to section 10(c) [29 USCS § 160(c)], is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [29 USCS § 160 (e), (f)], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part of the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10(e), 29 U. S. C. § 160(e):

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceed-

ings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of tile 28.

Sec. 10(f), 29 U. S. C. § 160(f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Administrative Procedure Act
(80 Stat. 392)

Sec. 10, 29 U.S.C. Sections 701-706:

Section 701. Application—Definitions.—(a) This chapter [§§ 701-706 of this title] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter [§§ 701-706 of this title]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix [see 22 §§ 2456(a), 2457], and

(2) "person," "rule," "order," "license," "sanction," "relief," and "agency action" have the meanings given them by section 551 of this title. (Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 392.)

702. Right of review.—A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. (Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 392.)

703. Form and venue of proceeding.—The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392.)

704. Actions reviewable.—Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392.)

705. Relief pending review.—When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for

certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.)

706. Scope of review.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.)